82-1723

No. 83-.....

In The

Supreme Court of the United States

October Term, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Although denied intervention below, does the Pyramid Lake Paiute Tribe, whose Reservation encompasses Pyramid Lake and the lower reaches of the Truckee River, have sufficient interest and standing in a decision adjudicating water rights on the Carson River to seek and be granted a writ of certiorari in this Court to review that decision when the result of the decision below will be the loss of Truckee River water which otherwise would flow to Pyramid Lake and benefit the endangered cui-ui and threatened Lahontan cutthroat trout which inhabit the Lake.

2. Does Section 8 of the Reclamation Act of 1902, 43 U. S. C. § 383, require striking contractually established water delivery requirements on a federal reclamation project because those requirements conflict with a subsequent *de novo* judicial determination of the maximum potential beneficial use of water on the project, absent any indication that the contract duties were arbitrary, capricious, an abuse of discretion, inconsistent with state law, or otherwise improper.

3. Whether the Nevada State Engineer has primary administrative jurisdiction, exclusive of the Secretary of the Interior, to approve changes in the uses and delivery sites of water on a federal reclamation project.

LIST OF PARTIES

The Plaintiff-Appellant in the United States Court of Appeals for the Ninth Circuit was the United States of America. The Defendant-Appellees in the Ninth Circuit were the Truckee Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the State of California, and the other water right holders under the decree of the district court. The Truckee-Carson Irrigation District appeared in its own right and as class representative of approximately 4,000 Newlands Project holders of water right contracts and applications. Because of the large number of upstream users whose rights are not affected by the present petition, the Tribe has filed with the clerk of this court a list of parties holding rights under the decree.

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PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Pyramid Lake Tribe prays for leave to intervene and that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in *United States v. Alpine Land and Reservoir Company* in January 24, 1983. The Tribe further prays that its petition for a writ of certiorari be deemed filed as of the date of its submission.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is printed in the Appendix (App.) at A, App. 1, and is reported at 697 F. 2d 851 (1983). The opinion of the district court is reported at 503 F. Supp. 877 (D. Nev. 1980) and is printed in the Appendix at F, App. 69. The order of the

Court of Appeals denying the Tribe's most recent motion to intervene is unreported but is printed in the Appendix at B, App. 20. On January 6, 1969, the district court denied a motion for tribal intervention. That order is printed in the Appendix at G, App. 107. The opinion of the Ninth Circuit affirming that earlier order is reported at 431 F. 2d 763 (1970) and is printed in the Appendix at H, App. 113. This Court's refusal to issue a writ of certiorari is reported at 401 U. S. 909 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 24, 1983 and this petition was filed within 90 days of that date. This Court has jurisdiction under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

Reclamation Acts

Section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390, 43 U. S. C. §§ 372, 383, provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in

> any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Section 17 of the Act of August 4, 1938, 53 Stat. 1197, 43 U. S. C. § 389, provides in part:

> The Secretary is further authorized, for the purpose of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy or for the adjustment of water rights, as in his judgment and necessary and in the interests of the United States and the project.

STATEMENT OF THE CASE

This suit was brought by the United States to quiet title to rights to the use of water on the Carson River in Nevada. The Carson River begins in the Sierra Nevada Mountains of California. Its two branches join in Nevada, flowing into the Carson Valley where the farmlands of the upstream users are located. Lands have been irrigated in this upstream area since the early 1850's and virtually every water right in this area has a priority date prior to 1902. From there, the River travels north and east through narrow desert valleys until it reaches Lahontan Reservoir, the primary feature of the Newlands Reclamation Project. Lahontan Reservoir also receives substantial amounts of water from the Truckee River through the

Truckee Canal. Below the Reservoir are lands irrigated by water from the Newlands Project. Most of the land owners are members of the Truckee-Carson Irrigation District ("TCID").

A. *The Newlands Project.* In 1902, the Secretary of the Interior withdrew from entry approximately 130,000 acres of public land of the United States in the Carson Sink Valley, Churchill County, Nevada. These lands were thought to be susceptible to cultivation if irrigated. On May 26, 1903, the Secretary gave notice of his claim, on behalf of the United States, to 5,000 cubic feet per second of unappropriated Carson River water for irrigation and other beneficial uses within the proposed project area. The Secretary also announced his intention to construct a storage reservoir to impound Carson River water when those waters were not required for irrigation and other beneficial uses. On May 30, 1903, the Secretary's notice was recorded with the Churchill County recorder. At that time, the Nevada State Cooperative Act of 1903 limited the amount of water that could be appropriated for irrigation to 3 acre feet per acre.

In 1914, the Lahontan Dam and the Lahontan Power Plant were completed. The Dam stores impounded water from the Carson River, as well as the water diverted from the Truckee River which reaches the Reservoir through the Truckee Canal. Pursuant to Section 4 of the 1902 Reclamation Act, 43 U. S. C. §419, the Secretary on May 6, 1907, announced the availability of water for the irrigation of 74,820 acres in the Carson and Truckee Divisions of the project. Those seeking to use such waters then engaged in transactions with the Secretary which ultimately resulted in the issuance or approval by the Secretary of record-

able instruments called "water rights certificates" or "water rights applications." In these instruments, the United States in essence contracted with project water users and agreed to supply project water to irrigate a specified amount of acreage owned by the farmer within the project. Construction of the entire project was fully completed by 1927.

For some 42,447 acres, contracts were signed between the Secretary or his delegate and project water users limiting the amount of project water delivered to no more than 3 acre feet per acre.[1] In contracts covering the balance of the lands, there is no express limitation governing the amount of water to be delivered, other than a recitation that such water "shall be beneficially used for the irrigation" of a specified amount of project land. *See* TCID Exh. 38.

B. *The Pyramid Lake Tribe and its Reservation.* The Pyramid Lake Paiute Tribe inhabits and governs the Pyramid Lake Indian Reservation which includes the lower reaches of the Truckee River and Pyramid Lake which has no outlet. One of the purposes of establishing the Reservation in 1859 was to enable the Pyramid Lake Indians to take advantage of the Pyramid Lake fishery which was subsequently devastated by the diversion of approximately half the flow of the Truckee River to the Newlands Project through the Truckee Canal. The Lake's principal fish, the Lahontan cutthroat trout and the cui-ui, are classified as threatened and endangered under the En-

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[1]Of these lands, approximately 10,420 acres are "vested rights lands," i. e., lands whose owners previously held an appurtenant water right which they exchanged in return for the right to receive a specific annual quantity of project waters. See, e. g., 42 I. D. 365, 382 ¶ 68 (1913).

dangered Species Act of 1973, 16 U. S. C. §§ 1531 *et seq.*; 50 C. F. R. § 17.11 at 76, 70 (1980); *United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286, 1294, (9th Cir. 1981), *modified,* 666 F. 2d 351 (1982), *cert. granted sub nom. Nevada v. United States,* Nos. 81-2245, 81-2276, and 82-38 (1982). The cui-ui is not found any place else in the world, *id.,* 649 F. 2d at 1290, and the restoration of both species is dependent upon obtaining more water for spawning flows and to maintain the level of the Lake. *United States v. Truckee-Carson Irrigation District, supra,* 649 F. 2d at 1292-94, 1311-13; *Carson Truckee Water Conservancy District v. Watt,* 549 F. Supp. 704, 710-11 (D. Nev. 1982) *appeal docketed* Feb. 17, 1983 (1983). *See generally* Brief of Cross Petitioner, Pyramid Lake Paiute Tribe of Indians in *Nevada v. United States,* Nos. 81-2245, 81-2276 and 82-38 at 2-6.

The Tribe is seeking judicial recognition of its reserved rights for fishery purposes. *See* the briefs of the Pyramid Lake Paiute Tribe filed in *Nevada v. United States, supra.* The Tribe also has sought to reduce the amount of water used by other Truckee River appropriators, principally the Newlands Project in order to obtain greater flows in the Truckee River for fish spawning purposes and to maintain the level of Pyramid Lake.[2] *See, Pyramid Lake Paiute Tribe v. Morton,* 354 F. Supp. 252 (D.D.C. 1973). (A copy of that decision is included in the Appendix at C, App. 21.)

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[2]The Tribe and the United States have also complained that the federal water master has permitted Truckee River diversions for agricultural purposes in the area surrounding Reno and Sparks far in excess of the decreed water rights. *See, United States v. Truckee-Carson Irrigation District, supra,* 649 F. 2d at 1294-95. That matter is currently pending before the district court in Nevada.

C. *The operation of the Newlands Project and its effect on the Truckee River.* Approximately 90% of the Newlands Project's irrigated acreage is within the Carson River drainage below Lahontan Reservoir. The Truckee and Carson Rivers are linked by the Truckee Canal which connects the Derby Diversion Dam on the Truckee River and Lahontan Reservoir. Most of the Truckee River water diverted at Derby Dam flows through the Truckee Canal and is stored in Lahontan Reservoir along with the stored waters of the Carson River or released into the Carson River below Lahontan for use on the lands of the Carson Division of the Newlands Project. The result is that the greater the demand for water by the Newlands Project, the larger the diversion of Truckee River water at Derby Dam. In turn, the larger the diversions at Derby, the less Truckee River water which flows into Pyramid Lake. App. C, App. 21.

From 1926 through the mid-1960's, the Truckee-Carson Irrigation District (TCID), an association of Newlands Project water users, operated the project, including Derby Dam and the Truckee Canal diversion facilities subject, at least in principle, to the temporary decree in this case, see pp. 9-10, *infra,* and the decree in *United States v. Orr Water Ditch Company,* In Equity No.-A-3 (D. Nev. 1944) on the Truckee River. In 1967, the Secretary of the Interior, apparently dissatisfied with the district's failure to abide by those decrees, promulgated regulations, 43 C. F. R. Pt. 418, which sought to "initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake." 43 C. F. R. § 418.1(b). These regulations were

predicated in part on the obligation of the United States as trustee "to protect and preserve the rights and interests of the Pyramid Lake Tribe of Indians in the Truckee River and Pyramid Lake." and were designed to implement both the Truckee and Carson River water rights decrees. 43 C. F. R. §§ 418.2(b), 418.2(c), 418.3(a), 418.5. The diversions for the Newlands Project were limited to no more than 406,000 acre feet, if available, from the Truckee and Carson Rivers. 43 C. F. R. § 418.4(b). The regulations also prescribed a procedure for the formulation of future reductions in that ceiling and more detailed operating criteria and procedures in succeeding years. 43 C. F. R. §§ 418.3, 418.4.

The Secretary's operating criteria and procedures were challenged by the Tribe and set aside by the district court in *Pyramid Lake Paiute Tribe of Indians v. Morton, supra.* The district court ordered the Secretary to submit amended operating criteria and procedures which "give proper weight to the maximum farm headgate entitlements of both the Orr Water Ditch and Alpine decrees." App. C, App. 21. After further proceedings, the Secretary was ordered to impose a limit of 350,000 acre feet as an interim measure in 1973 and a limit of 288,129 acre feet in 1974 and succeeding years. App. C, App. 21. The government accepted the court's decision, and after 1973, the Secretary's operating criteria limited TCID to no more than 288,129 acre feet from both the Truckee and Carson Rivers. *See, e. g.,* 38 F. R. 6697 (1973); 40 F. R. 1109 (1975); 41 F. R. 5411 (1976); 42 F. R. 39492 (1977); 44 F. R. 37561 (1979); 44 F. R. 61267 (1979). For purposes of this petition it is also important to note that the post-1973 operating criteria provide in Section D(4) that the

Secretary is not to approve any transfers of water rights unless TCID is in compliance with the regulations and the transfers do not enlarge consumptive use on the Project.

TCID refused to comply with the criteria published in March, 1973 and succeeding years. Consequently, in September, 1973, the Secretary of the Interior terminated the government's 1926 contract with TCID and stated the government's intent to take back operational control of the project, including Derby Dam, in October, 1974[3] TCID filed suit in March, 1973 challenging the validity of the contract termination and the post-1973 operating criteria. *Truckee-Carson Irrigation District v. Secretary of the Interior,* Civil No. R-74-34 BRT (D. Nev.). The Pyramid Lake Tribe intervened in that suit seeking to uphold the validity of the Secretary's termination of the 1926 contract and of the post-1973 operating criteria. That case is awaiting decision.

D. *The Course of Proceedings in this Case.* The case was instituted by the United States in 1925 to quiet title to the government's rights to use water from the Carson River on the Newlands Project and to fix the relative rights of the defendants. Jurisdiction was invoked pursuant to 28 U. S. C. § 1345 and the Act of September 19, 1922, 42 Stat. 849. Evidence was received by a Special Master between 1929 and 1940. In June, 1949, the district court entered a "Temporary Decree" and appointed a water master to administer the Carson River. A second, almost identical, order was entered on March 24, 1950.

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[3]The 1926 contract requires 1 year's notice prior to the effective date of termination.

These orders and the appendices and exhibits thereto are referred to as the "Temporary Decree" or "Temporary Restraining Order." The temporary decree purported to define the water rights on the Carson River until the district court's decision in December, 1980. For purposes of this petition, the most important aspect of the temporary decree was the establishment of a water duty for the lands within the Carson Division of the Newlands Reclamation Project as not to exceed 2.92 acre feet per acre (AFA) measured at the farm headgates.

In March, 1968 the Pyramid Lake Paiute Tribe moved to intervene in the district court. That motion was denied on the grounds that it was not timely, that the Tribe had no interest in the waters of the Carson River and that the Tribe's interest in the Truckee River water subject to diversion as a result of the *Alpine* decree was adequately represented by the United States, a concept which the United States put forward.

The Tribe appealed the denial of its motion to intervene. The Ninth Circuit affirmed, holding that the motion was not timely filed and that the Tribe was without sufficient interest in Carson River waters to merit intervention before the district court. *United States v. Alpine Land and Reservoir Company,* 431 F. 2d 763 (9th Cir. 1970), *rehearing denied,* 431 F. 2d 763 (9th Cir. 1970), *cert. denied,* 401 U. S. 912 (1971).

The district court rendered its opinion in this case on October 28, 1980. *United States v. Alpine Land and Reservoir Company,* 503 F. Supp. 877 (D. Nev. 1980). A final decree was entered on December 18, 1980. The water duty for the lands within the Carson Division of the New-

lands Project, measured at the farm headgates, was held to be 3.5 AFA for bottomlands and 4.5 AFA for benchlands, instead of the 3 AFA duty advocated by the United States. 503 F. Supp. at 885-88. In route to this conclusion, the Court held invalid the 3 AFA water delivery requirement found in the contracts between the United States and private landowners within the Newlands Project covering more than 42,000 acres. The court further found that the Nevada State Engineer, not the Secretary of the Interior, has the power to approve or reject applications to change the place of diversion, manner of use, or place of use of water within the Newlands Project. 503 F. Supp. at 892-93.

In its opinion, the Court of Appeals upheld these rulings. It found determinative the factual finding of the district judge that, in 1980, the concept of beneficial use required a water duty of 3.5 AFA for bottomland and 4.5 AFA for benchlands, noting that the district court's "factual findings were well within a permissible view of the weight of the evidence....". App. A, App. 1. The water duties established by the contractual agreements between the United States and the project water users were determined to be irrelevant because they were viewed at best as merely establishing beneficial use at the time of execution. The weight to be given those duties was further reduced because a specific water duty had not been included in every such agreement and the Secretary had only recently taken steps to compel the water user to adhere to the contract limits. The Court also determined that the Secretary of the Interior had no special role to play with regard to changes in the place and manner or use of water on the Newlands Project.

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

I. The Pyramid Lake Tribe has Standing to Seek Review of the Decision of the Ninth Circuit Court of Appeals because the Outcome of this Case Will Affect the Availability of Water Required to Restore and Maintain the Pyramid Lake Fishery.

The heart of the Tribe's interest in this case is the spectre of losing the benefit of its hard-earned victory in *Pyramid Lake Paiute Tribe of Indians v. Morton, supra.*[4] As described at pp. 7-9, *supra,* the implementation of the secretarial criteria imposed after that case would result in less Truckee River water going to the Newlands Project and more going to Pyramid Lake. The keystone of those criteria is the 2.92 AFA water duty established in the temporary decree in this case. The Court of Appeals' affirmance of the district court's upward revision of that duty will render those criteria meaningless and divest the Tribe of their benefit. In short, Pyramid Lake will lose between 38,000 and 60,000 acre feet of water by virtue of the Ninth Circuit's decision.[5]

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[4]The ramifications to the Tribe of the Ninth Circuit's decision is further highlighted by the State of Nevada's reliance on the Ninth Circuit's rejection of the contract water duty in its Reply Brief in *Nevada v. United States, supra,* at pp. 4-6.

[5]Assuming that the water duty decreed in the Alpine case applies to 75% of the irrigated lands within the Carson Division of the Newlands Project and ignoring the 4.5 AFA water duty for bench lands, the difference between the 3.5 and 3.0 (2.92 rounded off to 3) AFA water duties constitutes a loss of more than 38,000 acre feet annually to Pyramid Lake:

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The decision's impact on the Secretary's Operating Criteria was candidly acknowledged by TCID in a letter it wrote to the Secretary after the district court decision:

> The bottom line is that in light of the December 18, 1980 Final decree in the *Alpine* case, everyone must now concede that the court-imposed limitation on the releases from the Truckee Canal and Lahontan Reservoir . . . cannot be sustained. The decrees in the *Orr Ditch* and *Alpine* cases now clearly provide for substantially more irrigation releases than the court imposed 288,129 acre feet, under *anyone's* computation. Letter to James G. Watt from Joe Serpa, Jr. dated May 19, 1981. App. D, App. 51.

The holding that changes in the manner of use or place of use of water within the Newlands Reclamation Project are subject to the approval of the Nevada State Engineer, not the Secretary of the Interior, also injures the Tribe by taking away one of the means utilized by the Secretary of the Interior to obtain enforcement of the operating criteria that resulted from the *Pyramid Lake Tribe v. Morton* litigation. *See supra* at pp. 8-9. It also

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60,000 acres	(approximate irrigated acreage of Division)
x .75	
45,000 acres	(75% of irrigated acreage of Carson Division)
x . 5 acre feet	(difference between 3.5 and 3)
22,500 acre feet	(added quantity required to meet higher water duty-measured at farm headgates)
: 59%	(water conveyance efficiency for Carson Division)
38,135 acre feet	(added quantity required to meet higher water-duty-measured below Lahontan Reservoir).

(Continued on next page)

divests the Secretary of the administrative descretion to determine the effect of such changes on the project and other federal interests.

The gravamen of the Tribe's complaint, thus, is that TCID is diverting too much water from the Truckee River and that those diversions harm the endangered and threatened fish of Pyramid Lake and the ecosystem upon which they depend and interfere with the efforts to conserve those species. The Endangered Species Act bolsters the Tribe's standing to assert these injuries. By not seeking further judicial review, the federal government has failed to utilize its authorities to conserve and protect the two species and their ecosystem. *See TVA v. Hill, supra,* 437 U. S. 153 at 172, 180, 184-85 (1978); *Palila v. Hawaii Department of Land and Natural Resources,* 639 F. 2d 495 (9th Cir. 1981); *Carson-Truckee Water Conservancy District v. Watt, supra; Defenders of Wildlife v. Andrus,* 428 F. Supp. 167 (D. D. C. 1977). Permitting the Tribe to intervene will further the purposes and policies of that act. *See Warth v. Seldin,* 422 U. S. 490, 500-01, 509-10, 512-14 (1975); *United States v. Imperial Irrigation District,* 559 F. 2d 509, 521-522 (9th Cir. 1979), *aff'd on standing Bryant v. Yellen,* 447 U. S. 352, 366-68 (1980).

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If the 3.5 acre feet per acre water duty were applied to all of the irrigated land within the Carson Division, rather than just 75%, the loss to Pyramid Lake would be more than 50,000 acre feet annually. And the loss would be even greater if the 4.5 AFA water duty for benchlands is applied to any lands within the Carson Division. The district court did not determine the extent, if any, of any such benchland acreage within the Carson Division. TCID claims 9,000 acres of benchlands in the Carson Division of the Newlands Project (See Appendix D at App. 51) which would result in an additional loss of 15,250 acre feet inflow into Pyramid Lake (9,000 acres x 1 acre foot per acre (the difference between 4.5 and 3.5) divided by 59%).

Intervention by the Tribe is fully warranted since none of the present parties are pursuing these important matters and the Tribe has a vital stake in the outcome. *See Bryant v. Yellen, supra.* The upstream users are not concerned over how water is used on the Project because their rights are physically and legally superior to those of the Project. The state is interested only in asserting the interests of TCID. The United States once pledged to represent the Tribe's interests but, for some reason, has now decided not to seek further judicial review. Accordingly, it falls to the Tribe to voice concern over the harm to its interests and those of the Nation in the preservation of Pyramid Lake.[6]

This Court has permitted intervention at this stage by parties vitally affected by litigation even though those parties were denied intervention below. *See United States v. Terminal Railroad Association,* 236 U. S. 194, 199 (1915); *Hunter v. Ohio ex rel Miller,* 396 U. S. 879 (1969). The need for intervention in circumstances such as this in which private parties seek to advance the public interest has been forcefully stated by this court:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a

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[6]The well established national concern over the preservation of endangered and threatened species has been discussed previously. And Congress has also specifically voiced its concerns over the deterioration of the Pyramid Lake fishery and authorized efforts to restore the fishery in the Washoe Project Act of 1956, 43 U. S. C. § 617 *et seq. See, United States v. Truckee-Carson Irrigation District, supra,* 649 F. 2d at 1311-12.

> formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion. *Missouri-Kansas Pipeline Co. v. United States,* 312 U. S. 502, 506 (1941).

See also Cascade Natural Gas Corporation v. El Paso Natural Gas Co., 386 U. S. 129 (1967).

In this case, the Tribe wishes to assert the position urged unsuccessfully below by the United States. This is particularly appropriate in light of the prior pledge of the United States that it would represent whatever interests the Tribe might have in this case. Since that time, the Tribe's interests have substantially increased because of its victory in *Pyramid Lake Paiute Tribe v. Morton* and the subsequently implemented Secretarial regulations. As soon as the Tribe became aware that the United States would not act to protect the critical tribal interests in this case it moved promptly to seek further judicial review. TCID cannot claim that its "ability to litigate the issue [will be] unfairly prejudiced" since the Tribe is simply stepping in the shoes of the United States. *See United States v. McDonald,* 432 U. S. 385, 394 (1977).

Tribal intervention to protect its own interests is particularly appropriate in light of this Court's recent opinion in *Arizona v. California,* No. 8 Original, issued on March 30, 1983 which demonstrates concretely the risk to Indian tribes of relying on the federal government to advocate their interests. Certainly here, where the United States has stepped aside, the Tribe should be permitted to intervene to protect its own interests. *See also, Moe v. Salish & Kootenai Tribes,* 425 U. S. 463, 472 (1976) ("Looking to the legislative history of § 1362 . . . we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the

United States as trustee but for whatever reason were not so brought.")

It is worth noting in this regard that this case has placed unusual and extraordinary political pressure on the Department of Justice to accept a decision contrary to the position which it urged for over 55 years. *See* letter to the Honorable William French Smith from Paul Laxalt, dated August 6, 1981.[7] At the time that letter was sent, the United States sought repeated extensions to file its opening brief before the Ninth Circuit, claiming that the question of whether to appeal from the district court decision was being debated at the highest levels of the Justice Department.

The bottom line is that the Tribe's interests will be severely damaged if the 3 AFA water duty established by the lower court decisions is left standing. When the United States decided not to seek further judicial review, no one was left to advocate those interests or the national interest in maintaining an adequate water supply for the endangered and threatened species in Pyramid Lake and the lower reaches of the Truckee River. Accordingly, the Tribe should be permitted to intervene to seek review by this Court of the Ninth Circuit's decision.

II. The Water Duties Established by the Water Right Contracts and Applications of the Project Water Users Are Entitled to Judicial Deference and May Not be Upset by a de novo Judicial Determination of the Maximum Potential Beneficial Use of Water.

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[7]A copy of that letter is included as Appendix E. The Department has refused to release to the Tribe other correspondence between it and Senator Laxalt. That refusal is the subject of a separate lawsuit. *Pyramid Lake Paiute Tribe of Indians v. Department of Justice,* Civil No. 83-0384 (D. D. C. filed Feb. 10, 1983).

Throughout the history of the Newlands Project, the project water duty was consistently considered to be 3 AFA or slightly less. That amount was the upper limit of the duty first envisioned during the construction of the project. U. S. Exh. 9. It was the duty encompassed by state law when the Secretary posted his notice to appropriate water from the Carson River and when project lands were opened for settlement. That duty was also contained in the water rights contracts and applications for over 42,000 of the 73,002 acres of project land. After a period of greater delivery in the years 1909-1911, actual deliveries to project lands for the years 1912-1922 averaged approximately 2.92 acre feet per acre annually. S. Doc. No. 92, 68th Cong., 1st Sess. 216 (1924). A duty of 2.92 AFA was subsequently endorsed by the expert testifying for the United States in this case in 1929 and was embraced by TCID at that time and when the temporary decree was entered. Finally, the temporary decree entered in 1949 and renewed in 1950, established a 2.92 AFA duty for lands on the Newlands Project.[8]

Regulations adopted by the Interior Department to implement the 1902 Act initially authorized the acquisition and distribution of water by project water users by water right applications. A 1906 circular of the Interior Department, governing the acquisition of project water rights by potential project water users further provided that "the

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[8]Little weight is due the water duties established by the decree in *United States v. Orr Water Ditch Company*, in Equity, A-3 (D. Nev. 1944). First, those duties arose out of a consent decree and merely stated that the duties were not to exceed 3.5 AFA and 4.5 AFA. Perhaps more importantly, those duties were applicable to the full 232,000 acres of marginal land once envisioned to be part of the project. The marginal nature of those lands and their different physical characteristics makes inappropriate any comparison of those duties and the duties for the far better 73,002 acres of lands with water rights.

amount of water to be furnished per annum per acre of irrigable land will be fixed by the Secretary of the Interior . . ." 34 I. D. 544, 545 (1906).

In 1909, additional regulations instructed the Reclamation Service to advise its project engineers that their approval will be regarded as certifying, "(c) that the number of acre-feet per annum to be furnished is correctly stated." 37 I. D. 521, 522 (1909). See also 40 I. D. 641, 669 (1912). The application process was further refined by the Act of August 9, 1912, 43 U. S. C. 541-546, and by the Reclamation Extension Act of 1914, 38 Stat. 686, notably Sections 8 and 14, 43 U. S. C. 440, 475. Regulations were also adopted to reflect the 1912 and 1914 supplementary Acts. 42 I. D. 89 (1915); *United States v. Tulare Lake Canal Co.,* 535 F. 2d 1093, 1126-1131 (9th Cir. 1976), *cert. denied,* 429 U. S. 1121, 677 F. 2d 713 (1982) *vacated on other grounds,* — U. S. — (1983).

The 1924 Fact Finders' Report, by a commission appointed by the Secretary, confirmed that management by contractual limitations on water use was to continue. S. Doc. No. 92, 68th Cong., 1st Sess. (1924). *See United States v. Tulare Lake Canal Co., supra,* 535 F. 2d at 1131-1132. This unique report stressed the need for "wise and economical use of water" and stated that "the true measure of the proper use of Irrigation water is the water cost of the crop produced," S. Doc. 92 at 76. The report recommended that "compulsory steps should be taken to prevent the excessive use of water irrigation, as a means of making the water user protect himself against his own wasteful practices." Further, "water rights should never be established except upon the basis of a definite quantity of water" (*id.* at 78). *See also* Brief for the United States in *Nevada v. United States,* Nos. 81-2245, 81-2276 and 82-38 at n. 4.

The Ninth Circuit brushed this long history aside without a word to conclude that the district court was correct in making a *de novo* determination of beneficial use in 1980. The court's reasoning was briefly stated:

> As for the contracts, the provision of Section 8 [of the 1902 Act] mandating a beneficial use standard is a "specific congressional directive" which acts as a "restraint upon the Secretary." *See California v. United States,* 438 U. S. 645, 648 n. 31 . . . *Fox v. Ickes,* 137 F. 2d 30 (D. C. Cir.), *cert. denied,* 320 U. S. 792 . . . ; *Lawrence v. Southard,* 192 Wash. 287, 73 P. 2d 722 (1973), App. A, App. 1.

In addressing the argument of the United States and *amici* that a *de novo* decision by the district court was inappropriate, the Court of Appeals found the contract duties were entitled to "little evidentiary significance" simply because not every contract contained the 3 AFA limit. Thus, in the Ninth Circuit's view, the contract water duties were not even entitled to the limited review normally given to agency determinations.[9]

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[9]It is possible to view the Court's decision to reject the contract limits as based in part on the failure of the government to enforce those limits. If so, the Court misunderstood the history of the project and applied an erroneous test for judging such actions. In *Bryant v. Yellen,* 447 U. S. 352 (1980) this Court refused to apply acreage limitations to the Imperial Irrigation District, noting "the view that lands under irrigation at the time the Project Act was passed and having a present water right were not subject to the 160 acre limitations remained the *official view* of the Department of the Interior until 1964." 44 U. S. at 362 (emphasis added). Whatever the omissions of the federal government, the failure of TCID and the water users to abide by the contract duties was never officially condoned. There is no finding by the district court that when the United States was in control of the project prior in 1926, it ignored the contract limits or that the historical diversions were in excess of that amount. Indeed, the Fact Finders Report concludes just the opposite. What occurred is that TCID had a supplemental

(Continued on next page)

These issues are worthy of far greater consideration than that provided by the Ninth Circuit. The potential harm of the Ninth Circuit's decision is compounded by the fact that in *Fox v. Ickes,* 137 F. 2d 30 (D. C. Cir.), *cert. denied* 320 U. S. 792, the Court of Appeals for the District of Columbia refused to permit the Secretary of the Interior to rely on contract water duties in compelling project water users to pay additional construction charges for the Yakima Project in Washington. The Ninth Circuit's decision, along with *Fox v. Ickes, supra,* is likely to destroy forever the Secretary's ability to resolve by contract critical factual questions over the water requirements for federal reclamation projects. This case merits review by this Court for the following reasons:

1. The result reached by the Ninth Circuit will permit only the courts to finally determine the water requirements for federal reclamation projects even if the project water users, the other water right holders on the stream, and the Secretary are in agreement as to that issue at

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(Continued from previous page)

supply of water from the Truckee River and had no reason to abide by the contract or temporary decree limits. Because only the Tribe was injured by the excess diversions, no efforts were taken to limit water use on the Project until the Secretary sought to limit TCID's uses in 1967. But the official view remained that the water duties were legally constrained by the temporary decree and the contracts and applications. TCID's refusal to abide by the Secretarial regulations and its violations of the contract terms and the temporary decree cannot be said to nullify the terms of those documents. Nor can the project water users rightly claim surprise over having to abide by the terms for which they or their predecessors contracted. Article 7 of the Contract between TCID and the United States expressly requires TCID to deliver water in accordance with the terms of the individual contracts. Under the terms of that contract the individual water users agreed to this limit once again in Article 12.

the time the project is authorized and constructed. Under the Ninth Circuit's decision, project water users would be free to institute a stream adjudication at any time and claim water above and beyond the amounts for which they contracted. The need to avoid such uncertainty in water rights matters was strongly expressed by this Court in its recent decision in *Arizona v. California, supra,* slip opinion at 13-14.

In this case, unlike *Nevada v. United States, supra,*[10] the controlling documents mandate the conclusion that the water duty was anticipated by all who were involved to be no greater than 3 AFA. Nothing in the record suggests that the contract limits were arbitrary, capricious or otherwise improper. Accordingly, reliance on those duties by all users on the stream was fully justified. Yet the decision of the Ninth Circuit permits a belatedly concluded adjudication to rewrite the contract water requirements. That result—if widely applied—threatens to upset a procedure frequently resorted to by the Secretary and project water users to ascertain the water delivery requirements on reclamation projects. *See, e.g., Westlands Water District v. United States,* 700 F. 2d 561, 562 (9th Cir. 1983) (litigation arising over the Secretary's obligation under contracts relating to the delivery of water on a reclamation project); *In Re Bridger Valley Conservancy District,* 401 P. 2d 289, 291-92 (Wyo. 1965).

This case, thus, raises substantial questions over the role to be accorded the courts in ascertaining the water requirements for federal reclamation projects. By con-

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[10]See Brief for the United States in *Nevada v. United States* at pp. 7-25.

cluding that only the judiciary may finally decide such questions, the Ninth Circuit usurps far too much of the authority granted the Secretary to resolve these matters. Whatever the 1902 Act says about beneficial use, it does not require the courts to be sole arbitrator of that question.

2. The decision of the Ninth Circuit to reject the contract water duties in favor of duties reflective of the maximum beneficial use of water on the project ignores this Court's teachings regarding the deference due the need for conservation in resolving disputes over water. *See, e. g., Sporhase v. Nebraska,* — U. S. —, 73 L. Ed. 1254, 1265 (1982). ("The only purpose that appellee advances for § 46-613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important . . .")

In the present case, the Court of Appeals held that the contracts were not binding if they "pointed to a different water duty than a beneficial use inquiry would indicate." App. A, App. 1. As authority for its conclusion that the execution of the contracts with 3 AFA limit did not legally restrain the project water users to the duty for which they contracted, the court relied on its perception of a clear congressional directive in favor of beneficial use in Section 8 of the 1902 Act, 43 U. S. C. § 383. That directive, in the view of the court, prohibited any contract limit which provides less than a current view of the maximum potential beneficial use.

The Court of Appeals' reliance on Section 8 overlooks the congressionally endorsed administrative powers of the Secretary. Those powers entitle the Secretary and the water users to agree by contract to a water duty which

is less than the maximum permissible. In *Colorado v. New Mexico,* — U. S. —, 74 L. Ed. 348, 357 (1982) this Court, with regard to the allocation of water in an interstate stream affirmed the need to consider whether "reasonable conservation methods" would offset any injury to existing users of granting additional appropriations. It was also considered appropriate to consider whether those seeking new appropriations had "undertaken reasonable steps to minimize the amount of diversion that will be required". *Id.*[11]

Nevada statutes and case law also stress the need for conservation. Nevada law provides that rights "to the use of water shall be limited and restricted to so much thereof as may be necessary, when reasonably and *economically* used for irrigation and other beneficial uses. . . ." NRS 533.060 (emphasis added). *See, e.g., Roeder v. Stein,* 23 Nev. 92, 42 P. 867 (1895); *Doherty v. Pratt,* 34 Nev. 343, 124 P. 579 (1912). Likewise, the 1926 contract between TCID and the United States directs TCID and its users "to secure the *economical* and beneficial use of irrigation water" (emphasis added). In rejecting the contract delivery requirements, the Ninth Circuit paid no heed to these principles because it felt that Section 8 mandated a *de novo* examination of beneficial use and that contract duties less than that must be rejected even if such duties would result in water conservation. But nothing in the Reclamation Act of 1902 or its history suggests that the project waters users could not contract for

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[11]Although the Supreme Court's decision invokes principles of equitable apportionment, its concerns for the efficient use of water is extracted from Wyoming v. Colorado, 259 U. S. 419, 484 (1922), which expressly relied upon principles of prior appropriation.

water duties which provide for less than the maximum potential beneficial use, particularly if the contract duty was in keeping with state law and provided for the use of less than the maximum amount of water.

Assuming *arguendo* that reformation of the contracts may be justified upon a proper factual showing, that burden is not met by a finding that the farmers could use or have used in excess of the contract limits. Instead, rejection of the contract limits, if justified at all, should require a determination that no "reasonable conservation methods" exist which would permit the farmers to maintain their current production levels under the contract water duties. Here, the Ninth Circuit merely confirmed the district judge's determination that more water than the contract limit could be beneficially used.

The Ninth Circuit simply failed to heed the guidance provided in *Colorado v. New Mexico, supra,* and elsewhere on the weight to be given historical uses of water in determining water rights. The need to conserve water means that the mere historical use of water does not justify failing to employ all reasonable conservation methods in the future. In a similar fashion, validly established contract limits which would save water may not be ignored simply because more water has been or may be used. At the very least, those who wish to avoid such limits must be able to demonstrate conclusively that no conservation methods exist which would permit them to abide by such limits and maintain historical production limits. That is a test which the Newlands Project farmers have not been asked to satisfy by either the district court or the Ninth Circuit.

3. The decision of Ninth Circuit is also worthy of review because the rejection of the contract water duties

means that less water will be available for the endangered and threatened species which reside in Pyramid Lake and the lower reaches of the Truckee River. See pp. 5-6 and 12-14, *supra*. Absent restoration of its fishery, the Tribe will be unable to develop its Reservation as a permanent homeland. This Court has recognized the "number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 143 (1980). Destruction of the fishery also runs counter to the established national policy of preserving endangered and threatened species. See p. 14, *supra*. Moreover, restoration of the Pyramid Lake fishery has been the express concern of Congress. See note 6, *supra*.

The Ninth Circuit's decision will make it far more difficult to uphold these strong federal policies as they relate to Pyramid Lake.

III. The Court's Decision to Grant Primary Administrative Jurisdiction to the Nevada State Engineer Overlooks Specific Congressional Directives Granting Such Authority to the Secretary.

The Ninth Circuit agreed with the district court that "applications for changes in place of diversion or manner of use should be directed to the Nevada State Engineer," viewing these changes applications as of "limited significance." Again the court's rationale was simple:

> The Supreme Court has held, in *California v. United States*, 438 U. S. 645 (1978), that state law will control the distribution of water rights to the extent there is no preempting federal directive. We agree with the district judge that "the conspicuous absence of transfer procedures, taken in conjunction with the

clear general deference to state water law, impels the conclusion that Congress intended transfers to be subject to state water law." App. A, App. 1. (citation omitted.)

That conclusion overlooks the authority in the 1902 Reclamation Act, 43 U. S. C. § 373, and elsewhere, *e. g.*, 43 U. S. C. § 440, granting wide regulatory authority to the Secretary over the operation of federal reclamation projects. Although the Court of Appeals found language in the legislative history of the 1902 Act extolling the virtues of state engineers, it overlooked the later congressional pronouncement in 43 U. S. C. § 389, granting the Secretary authority "to enter into such contracts for the exchange or replacement . . . of water rights . . . or for the adjustment of water rights, as in his judgment are necessary and in the interest of the United States and the Project." Accordingly, specific congressional directives exist giving extensive discretionary authority to the Secretary relative to changes in the place and manner of use of water rights on the project.

This matter is of considerable importance in the Truckee-Carson basin. The Secretary's operating criteria for the Newlands Project, mandated by *Pyramid Lake Paiute Tribe of Indians v. Morton, supra,* seek to protect federal interests in the Truckee River (*i. e.*, the flows required for the Pyramid Lake fishery) by prohibiting any transfers which enlarge project uses.

In short, Congress has directed the Secretary to monitor changes in the place and manner of use of project water rights. Reference to state law in considering the impact of project changes on off-project, non-federal water users is perhaps appropriate. So too, there is probably little justification for challenging the role assigned

here to the State Engineer in those limited issues. The Secretary, however, is the proper party to decide issues involving changes on the project which affect other federal interests, such as the need for water in the lower reaches of the Truckee River and Pyramid Lake.

Although under reclamation law, considerable deference is due state law and state procedures, Congress has preserved some prerogatives in the Secretary of the Interior. *See, e. g., California v. United States,* 438 U. S. 645, 664 n. 19, 668 n. 21, 670-74 (1978). The Ninth Circuit's approval of the district court's grant to the State Engineer of primary jurisdiction over changes in project uses runs counter to the language of 43 U. S. C. § 389 which gives such authority to the Secretary. This Court should review that decision in order to protect the Secretary's powers.

CONCLUSION

For these reasons, this petition for leave to intervene and petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4084

D. C. No. D-183 BRT

UNITED STATES OF AMERICA,

Appellant,

vs.

ALPINE LAND & RESERVOIR CO.; TRUCKEE-CARSON IRRIGATION DISTRICT; SIERRA-PACIFIC POWER CO.; STATE OF NEVADA; and CERTAIN UPPER CARSON RIVER WATER USERS,

Appellees.

Appeal from the United States District Court
for the District of Nevada

Honorable Bruce R. Thompson,
Senior United States District Judge, Presiding

Argued and Submitted: May 14, 1982

OPINION

(Filed January 24, 1983)

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges.

KENNEDY, Circuit Judge:

The Carson River runs eastward from the Sierra Nevada range in California, through a part of Toiyabe National Forest, and then to Lahontan Reservoir in central Nevada, where it joins with water from the Truckee River Diversion Canal. *See United States v. Alpine Land & Reservoir Co.*, 431 F. 2d 763, 765-66 (9th Cir. 1970),

cert. denied, 401 U. S. 909 (1971). Downstream from Lahontan Reservoir lies the Carson Division of the Newlands Project, whose farmers are mostly members of the Truckee-Carson Irrigation District (TCID), one of appellees here. The Newlands Project on Nevada's Carson River was one of the first constructed under the Reclamation Act of 1902, 32 Stat. 390, *codified at* 43 U. S. C. § 371 *et seq.*

This suit was begun by the United States as a quiet title action in 1925, although no final decision was rendered until the decision of the district court in 1980, reported at 503 F. Supp. 877 (D. Nev. 1980). This litigation is a "virtually comprehensive adjudication," *United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286, 1308 (9th Cir. 1981), of the rights of all parties to the Carson's waters, and much of the district court's opinion and extensive final order is not contested by any party. On this appeal, the United States does argue that the water duty awarded farms in the Newlands Project was too generous; that the Secretary of the Interior, rather than the Nevada State Engineer, should have primary jurisdiction over change applications; that the district court erred in rejecting the United States' claim of a reserved right of instream flow for Toiyabe National Forest; and that no water duty for fishing and recreation at Lahontan reservation should have been awarded. *Amici* Paiute Tribe, Environmental Defense Fund, and Sierra Club agree with the United States in whole or in part. Supporting the decision are TCID, the State of Nevada, and Sierra Pacific Power Company.[1] We uphold the decision of the district

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[1]Certain upstream farmers have participated as appellees in this suit, but their only interest is in defending the water duty awarded them, which the United States does not challenge.

court, for the most part, although we vacate the judgment with reference to the water duty awarded for public recreation pending more specific findings. We discuss the issues seriatim.

I. Water Duty for Newlands Project Farmers

The district judge awarded a water duty of 3.5 acre-feet/year (afa) to bottomland farmers, and 4.5 afa to benchland farmers in the Newlands Project. The United States and supporting parties argue that the district court erred in making a *de novo* determination of beneficial use. The Government argues that the district court instead should have ruled in reliance on contracts executed by the Department of the Interior and some landowners which purport to limit the water duty to a maximum of 3 afa, or alternatively on a 1903 Nevada statute, passed after the priority date of the Newlands Project, which limited beneficial use to 3 afa until it was repealed in 1905. The United States also argues that the findings of the district court on beneficial use were inadequate. We reject these contentions.

Our starting point is section 8 of the Reclamation Act of 1902, 32 Stat. 390, now codified at 43 U. S. C. § 372 (1976), which states:

> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

By the terms of the statute, beneficial use is the "basis" and "measure" as well as the "limit" of water rights; it sets the maximum water duty, but, under the statute, it is also the necessary rationale and source of the right. This

determination by Congress is explained both by the historical significance of the beneficial use concept in Western water law, and by the absence of any other intelligible standard offered by these parties to measure water rights.

The legislative history of the 1902 Reclamation Act makes clear that the "principles underlying and governing water rights" under the Act were to be the existing beneficial use concepts of western water law. 35 Cong. Rec. 6677 (1902) (remarks of Rep. Mondell). Section 8 "clearly recognizes the rule of prior appropriation which prevails in the arid region, and, what is highly important, specifies the character of the water right which is provided for under the provisions of the act." *Id.* at 6678. Rep. Mondell went on to describe the manner in which a water duty would vest:

> The main line canals having been constructed by the Government, the entryman or landowner would proceed to the construction of such laterals as were necessary for the irrigation of his own tract and the preparation of the same to receive the water. The water having been beneficially applied and payments having been made under the provisions of the bill, the water right would become appurtenant to the land irrigated and inalienable therefrom. The water rights provided by the act are of that character which irrigation experience has demonstrated to be the most perfect.
>
> The settlor or landowner who complies with all the conditions of the act secures a perpetual right to the use of a sufficient amount of water to irrigate his land, but this right lapses if he fails to put the water to beneficial use. . . .

Id. at 6679. While there were provisions of federal law which were intended to displace state law, such as the

160-acre limit at issue in *United States v. Tulare Lake Canal Co.*, 677 F. 2d 713 (1982), beneficial use itself was intended to be governed by state law. *See* Remarks of Rep. Mondell, *supra;* 35 Cong. Rec. 2222 (1907) (remarks of Sen. Clark); *California v. United States,* 438 U. S. 645 (1978). We do not deny or overlook the differences in water law among the various western states. However, on the point of what is beneficial use the law is "general and without significant dissent." 1 *Waters and Water Rights* § 19.2 at 85 (R. Clark ed. 1967). Therefore, unless it is shown that a state applies a special rule of law on a relevant point, it is proper to apply general law in defining beneficial use.

We briefly review these general principles here. The major conceptual tool for implementing beneficial use is the water duty, which is the amount of water an appropriator is entitled to use, including a margin for conveyance loss. This definition of "water duty" is often quoted:

> It is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon. It is not a hard and fast unit of measurement, but is variable according to conditions.

Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 584-85, 272 P. 2d 629, 634 (1954); *see also Basin Electric Power Cooperative v. State Board of Control,* 578 P. 2d 557, 564 (Wyo. 1978); *State ex rel. Reynolds v. Mears,* 86 N. M. 510, 515-16, 525 P. 2d 870, 875-76 (1974); 1 *Waters and Water Rights* §§ 19.2-19.5 at 85-93 (1972); 5 *id.* § 408.2 at 79-80 (R. Clark ed. 1967).

There are two qualifications to what might be termed the general rule that water is beneficially used (in an accepted type of use such as irrigation) when it is usefully employed by the appropriator. First, the use cannot include any element of "waste" which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods. *See, e. g., State ex rel. Erickson v. McLean,* 62 N. M. 264, 271, 308 P. 2d 983, 987 (1957); *Glenn Dale Ranches, Inc. v. Shaub,* 94 Idaho 585, 588, 494 P. 2d 1029, 1031-32 (1972); 1 *Waters and Water Rights* §§ 19.2, 19.5 at 87, 91-92 (R. Clark ed. 1967). Second, and often overlapping, the use cannot be "unreasonable" considering alternative uses of the water. In *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.,* 245 F. 9, 22-25 (9th Cir. 1917), although application of additional water over the water duty awarded by the district court would provide some benefit to the appropriator, we upheld the district court's water duty because the gain was so small (compared to the amount of water necessary to bring it forth) that the additional increment of water would not be "economically applied." *Id.* at 24. *See also In re Water Rights of Deschutes River & Its Tributaries,* 134 Or. 623, 664-68, 286 P. 563, 577-78 (1930) (use of water to carry off debris in aid of power generation not allowed in irrigation season when the same water would otherwise irrigate 1600 acres); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irr. Dist.,* 3 Cal. 2d 489, 567-68, 45 P. 2d 972, 1007 (1935) (use of water by farmers to drown gophers not allowed in area with chronic water shortage). *See generally* Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams,* 12 Wyo. L. J. 1, 14-17 (1956).

The United States and supporting *amici* argue that the district court should have given decisive significance to contracts limiting the water duty to 3 afa which the Secretary of the Interior executed with some but not all landowners. We are also told all of the Newlands Project is limited to a 3 afa water duty by virtue of 1903 Nevada Stats., Chap. IV, § 2:

> the quantity of water which may be appropriated or used for irrigation purposes in the State of Nevada [is limited to] three acre feet per year for each acre of land supplied.

The district court was not bound by either the contracts or the 1903 Nevada statute if either pointed to a different water duty than a beneficial use inquiry would indicate. As for the contracts, the provision of section 8 mandating a beneficial use standard is a "specific congressional directive" which acts as a "restraint upon the Secretary." *See California v. United States,* 438 U. S. 645, 678 n. 31 (1978); *Fox v. Ickes,* 137 F. 2d 30 (D. C. Cir.), *cert. denied,* 320 U. S. 792 (1943); *Lawrence v. Southard,* 192 Wash. 287, 73 P. 2d 722 (1937).

The district judge found that under the Nevada "relation back" doctrine, the 1903 statute did not affect the Project farmers' rights which had vested in 1902. We do not find this decision of the district court on the law of its own state incorrect. Even assuming the Nevada statute provided a measure other than beneficial use, the limit would be ineffective in view of the binding "congressional directive" that "the water right must be . . . governed by beneficial use." *California v. United States,* 438 U. S. 645, 668 n. 21 (1978).

The United States and *amici* argue that, even if beneficial use is the measure, the contracts and Nevada law are compelling evidence of beneficial use. Although we reject the conclusion the United States wants, we do not hold that the Secretary's contracts were *ultra vires* when made, or that the Nevada statute (assumed for the moment to be applicable) stated a limitation inconsistent with beneficial use as of 1903. This is not the question before us. The issue we review is whether the district court reached a correct determination of beneficial use as of 1980. It is settled that beneficial use expresses a dynamic concept, which is a "variable according to conditions," *Farmers Highline Canal,* 129 Colo. at 585, 272 P. 2d at 534, and therefore over time, *see United States v. Fallbrook Public Utility District,* 347 F. 2d 48, 58 (9th Cir. 1965); *Tulare Irrigation Dist. v. Lindsay Strathmore Irrigation Dist.,* 3 Cal. 2d 489, 567, 45 P. 2d 972, 1007 (1935); *Basin Electric Power Cooperative v. State Board of Control,* 578 P. 2d 557, 563 (Wyo. 1978). As counsel for the United States argued before the district court, "we are fortunate that this case has dragged along so long, because we know more about the Carson Valley than we did originally." 1979 Record, Vol. I at 16. All parties presented evidence aimed at identification of current beneficial use, as a matter of fact. The district court, in the absence of any earlier administrative or judicial determination of beneficial use, was correct to find beneficial use as of the present time, as shown by the best available current information.[2]

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[2]*Amicus* Paiute Tribe suggests that this holding will cause uncertainty and instability in water law. We find the law to be

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In the circumstances, it is clear the district court did not err in giving the contracts and the Nevada statute relied on by the United States little evidentiary significance. The United States has made no consistent determination that 3 afa is the maximum water duty that could be beneficially used by the Project farmers. Indeed, it appears that one landowner would sign a contract containing a 3 afa limit, while others, identically situated, signed contracts promising all the water needed for "proper irrigation." An administrative determination which is not consistently maintained is entitled to little, if any, deference. *See County of Washington, Oregon v. Gunther,* 452 U. S. 161, 177-78 (1981); *United Housing Foundation, Inc. v. Forman,* 421 U. S. 837, 858 n. 25 (1975). We further note the evidence showed that the 3 afa contracts were never enforced; historically, no distinction was made between landowners with and without the limiting contracts. The district judge did not err in giving little weight to the scattered contracts with 3 afa limits in the context of a case in which ample expert evidence of actual present beneficial use was heard.

For similar reasons, the district court did not err in ignoring the 3 afa limit of the 1903 Nevada statute. The

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clear on this point; in the absence of a conclusive determination of water duty by administrative or judicial proceedings, a district court in a quiet title action should determine beneficial use on the best current evidence available. The holding of the district court in this case, which we affirm, does not interfere with settled expectations, since the water duty awarded is in accord with actual historical use of the Carson's waters by the Project farmers. It is actual use which, if reasonable, is evidentiary of "beneficial use," not unenforced contracts or limits set by a repealed state law.

Nevada statute has been repealed for many years. Testimony before the district court indicated that water duties of more than 3 afa are common in Nevada. We agree that the statute's repeal "represents a legislative judgment that a specific limitation was ill-advised under the varying conditions of climate and soil in Nevada." 503 F. Supp. at 886.

The United States also contends that the findings of the district court on beneficial use were not adequate. It is true that findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *South-Western Publishing Co. v. Simons,* 651 F. 2d 653, 655 (9th Cir. 1981), *cert. denied,* — U. S. —, 102 S. Ct. 1714 (1982), quoting *Alpha Distributing Co. of California v. Jack Daniels Distillery,* 454 F. 2d 442, 453 (9th Cir. 1972), *cert. denied,* 419 U. S. 842 (1973). The opinion of the district judge fulfilled this requirement. In light of the record, we can readily understand the grounds of the district court's opinion; all issues raised were intelligibly dealt with by the district court.

The United States does not squarely argue that the district court made any legal errors in finding beneficial use.[3] One of the Government's arguments, however, might

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[3]The United States argues that the district court's decision was corrupted by an erroneous belief that the water rights in question were "owned" by the Newlands Project farmers, subject only to the "lienholder" interest of the United States in repayment of project costs. We do not see the relevance of this premise to the issue of beneficial use. The United States' interest in the determination of a user's water duty, as declared by the statute, is to see that beneficial use is its measure and limit. Any interest of the United States in other aspects of the project can hardly affect the beneficial use inquiry.

be interpreted as arguing that the district court erred in defining beneficial use as the amount of water which would yield "maximum crop yields," rather than that amount which, "economically applied," would produce "historical yield" over most of the past 26 years. This contention fails because the case, as argued to the district court, presented a factual dispute rather than a legal one. The beneficial use controversy here was essentially a question of fact, and all parties proceeded in accordance with well-settled general principles to determine it. There was uncontradicted testimony that the water duty awarded by the district court has been customarily provided the farmers since before 1926, when TCID began operation of the Newlands Project. This has also been the water guaranteed the Newlands Project farmers under the Orr Ditch decree. The Orr Ditch decree governs the Truckee's waters, which, by means of the Truckee River Division Canal, join with the Carson's waters at Lahontan Reservoir. *See generally United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286 (9th Cir. 1981). TCID's evidence tended to show this historical water usage was reasonable. The United States' evidence tended to show that historical yields could be obtained with less water. Once the district court corrected for the fact that the United States' expert used alfalfa yields obtained in lysimeters rather than those obtained under necessarily less meticulous field conditions, and for the fact the United States' expert used yields over the past 26 years rather than the significantly higher production of the past 10 years as a benchmark, the evidence

presented by the United States was in broad agreement with that presented by TCID.[4] *See* 503 F. Supp. at 888.

Neither the United States nor the Paiute Tribe argues that the district court's findings were clearly erroneous. *Amicus* Paiute Tribe does suggest that we should find waste by virtue of the comment of this court in *United States v. TCID*, 649 F. 2d at 1311, that "the Newlands Project is relatively inefficient in its use of water." This comment was not based on any factfinding by our court or by the court below, and it cannot substitute for evidence of the existence and extent of waste or inefficiency before the trial court. There was credible evidence below to indicate the contrary: that a reduction to the 3 afa water duty sought after by the United States would drastically reduce the farmers' yields over the long term. Yield was correlated with water use in a linear relation over the relevant water levels. Agricultural yields are a significant and reliable guide in determining beneficial use.

Findings of a district judge, made in reliance on controverted expert testimony, will not be disturbed unless clearly erroneous. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 365 F. Supp. 235 (N. D. Cal. 1982). The Supreme Court has only recently emphasized our nar-

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[4]Thus, contrary to the argument of the United States, the district court did not rest on the conclusory statement that TCID's expert evidence was "more credible" than that so vigorously put forward by the United States. Indeed, in determining consumptive use (the actual amount used by the growing crop, leaving aside transmission losses), the district court used the figure argued for by the United States' expert, with the two corrections noted. No one has argued that the 2.99 afa consumptive use figure found by the district court on the basis of the United States' evidence was inconsistent with the water duties awarded by the district court.

row scope of review when we review a factual determination of a district court that does not evince any misapprehension of relevant legal standards. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, — U. S. —, 102 S. Ct. 2182, 2188 (1982). Our review of the record indicates there was ample evidentiary support for the decision of the trial court that 3.5 afa was an appropriate water duty for bottomlands, and 4.5 afa for benchlands, with their lower water table and drier soil. Since the district court made no legal error in defining beneficial use, and its factual findings were well within a permissible view of the weight of the evidence, the water duty awarded the Project farmers must be upheld.

II. *Primary Administrative Jurisdiction With the Nevada State Engineer*

The district judge held that applications for change in place of diversion or manner or place of use should be directed to the Nevada State Engineer. These change applications are of limited significance in that they only seek permission to use water already appropriated for a purpose different than that originally designated. For example, if a farmer were to change his manner of irrigation, or to subdivide his farm into residential properties, under the district court's order, the Nevada State Engineer would decide, under the state statutory scheme, whether the application would "tend to impair the value of existing rights or to be otherwise detrimental to the public welfare." Nev. Rev. Stat. § 533.370(1).

The United States is not concerned with the routine change application, but with the possibility that federal interests will be ignored by the Nevada State Engineer.

Under section 8 of the 1902 Reclamation Act, discussed *supra*, appropriated water must be applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant. As described by Rep. Mondell, a water right under the Reclamation Act "only extends to the use of the water on and for the tract originally irrigated"; there is no general "property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended." 35 Cong. Rec. 6679 (1902).

We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer. The Supreme Court has held, in *California v. United States*, 438 U.S. 645 (1978), that state law will control the distribution of water rights to the extent that here is no preempting federal directive. We agree with the district judge that "the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, impels the conclusion that Congress intended transfers to be subject to state water law." 503 F. Supp. at 884. Powerful support for this conclusion is found in the legislative history of the 1902 Reclamation Act:

> The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. The conditions that prevail at 7,000 feet of altitude are different from those that prevail at almost sea level. In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.

> Everyone of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution to the problem of irrigation in their individual localities.

35 Cong. Rec. 2222 (1902) (remarks of Sen. Clark). *Cf. Colorado River Water Conservation District v. United States,* 424 U. S. 800, 819-20 (1976) (discussing a similar, but later, congressional recognition in the McCarran amendment). We are assured that the United States will receive notice of each change application, and may participate, under Nev. Rev. Stat. §§ 533.110, 533.130, in proceedings before the state engineer who is, under our Constitution, bound to follow federal law. The decree of the district court also allows for appeal of change applications to the federal district court for the District of Nevada, and no appellee contests this provision. These two safeguards provide full vindication of the admitted federal interests in the operation of federal reclamation projects.

Fundamental principles of federalism require the national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy. *California v. United States,* 438 U. S. 645 (1978).

III. *Toiyabe National Forest*

The district court rejected the United States' argument that it was entitled to a water duty of instream flow, reserved by implication when the affected portion of the Toiyabe National Forest was created by statute. *See Winters v. United States,* 207 U. S. 564, 577 (1908); *Arizona v. California,* 373 U. S. 546, 597-98 (1963); *Cappaert*

v. United States, 426 U. S. 128, 143-46 (1976); *United States v. New Mexico*, 438 U. S. 696 (1978).

As we understand it, the district court ruled, 503 F. Supp. at 893, that the United States would have been entitled to a reserved right if it had shown that the right was "necessary to preserve the timber or to secure favorable water flows for private and public uses under state law." *United States v. New Mexico*, 438 U. S. at 718; *see also id.* at 724-25 (Powell, J., dissenting in part).

The district court held, however, that the United States did not meet this standard. "The evidence to support the assertion that maintenance of such minimum flows is necessary for watershed protection or timber production . . . was insignificant." 503 F. Supp. at 893.

We first find it necassary to discuss the nature of a reserved instream flow right. It appeared from the evidence presented below that since the sought-after right is one of instream flow only and not of diversion, awarding it would not harm downstream interests. The only result of recognizing a reserved right of instream flow will be to restrict upstream diversion by appropriators with a later priority date than the date of dedication of the national forest. It is possible that such upstream diversion might one day threaten, but the United States did not demonstrate that the water rights of existing downstream interests in the Carson's water would not suffice to protect the banks of the Carson's tributaries within the forest from erosion. In fact, in a colloquy with Judge Thompson below, counsel for the United States agreed that "the possibility that someone else will come in and take water for the detriment of those existing [instream] flows" was

avoided "by making a finding that all the waters of the Carson River and its tributaries have been fully appropriated." Moreover, the United States' evidence of what average instream flows were fell far short of a demonstration that the instream flow was necessary to fullfillmen of the purposes of the forest. *Cf. Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 39, 577 P. 2d 9, 18 (1978); Boles & Elliott, United States v. New Mexico *and the Course of Federal Reserved Water Rights*, 51 Colo. L. Rev. 209, 229 (1978). The district judge did not err in rejecting the United States' claim for a reserved water right with respect to the parties in this litigation.

IV. *A Water Duty for Recreation at Lahontan Reservation*

The district court in its opinion took judicial notice of the fact that fishing and public recreation have taken place on Lahontan Reservoir virtually since the construction of the dam. Thus, the water has been beneficially used and the United States has not abandoned or forfeited these rights. 503 F. Supp. at 883. The district court thus awarded a water duty of 30,000 acre-feet for such activities, finding that the evidence indicated this was the "minimum amount of water that must be retained in the reservoir to support the fish habitat and provide swimming and boating areas." *Id.* at 889. It is not clear to us what evidence the court relied upon in this respect. Certainly no party presented evidence to establish a specific, public recreational right. The United States did not seek this water duty, and on appeal argues that it is erroneous, as do *amici* and TCID.

We are unwilling to accept as determinative the agreement of the parties that no such water duty is proper.

Those taking advantage of these recreational opportunities were not parties, or at most, were represented most grudgingly and inadequately by the United States.

While the district court found that "the public" could gain rights to a reclamation project reservoir by continuous beneficial use under state law, 503 F. Supp. at 883, whether water rights for public recreation are permissible under the Reclamation Act has not been briefed or discussed. We are also unsure of the necessity for the nonconsumptive water duty awarded by the district court. Fishing and recreation have been consistently enjoyed, notwithstanding the absence of any formally awarded water duty; since the waters of the Carson are fully appropriated, we do not foresee how the public's recreational benefits can be threatened by any new use. In this respect, the water duty awarded the public for instream use resembles the guarantee of instream flow the United States unsuccessfully sought for Toiyabe National Forest. Assuming for the moment that such a water duty is proper in principle, we are not sure the district court had an adequate factual basis for awarding the precise water duty chosen. We therefore vacate the portions of the district court's order pertaining to a water duty for public recreation.

The district court maintains jurisdiction over this matter. *See Hamilton v. Nakai*, 453 F. 2d 152, 155-58 (9th Cir.), *cert. denied*, 406 U. S. 945 (1972). "A district court's equitable discretion is characterized by flexibility, the need for practicality, and the duty to reconcile the public interest with private needs." *Harjo v. Andrus*, 581 F. 2d 949, 952 (D. C. Cir. 1978). We therefore leave it to the

determination of the district court to state an orderly resolution of the legal propriety (and if necessary, the factual extent) of a water duty for public recreation. The district court need not allow the issue to lie unresolved; if the United States is unwilling to represent the public, anyone with standing who can adequately represent the public's interest may be allowed to do so. *Warth v. Seldin,* 422 U. S. 490, 501 (1975).

We do hold that, contrary to the final decree of the district court, any water duty for public recreation that is awarded must be subordinate to the agricultural needs of the Newlands Project farmers. The Lahontan Reservoir, as a project built under the federal Reclamation Act, was intended for the primary benefit of the farmers who would use its waters for irrigation, and any beneficial use of the reservoir by way of recreation could only be incidental to that purpose. *See Jicarilla Apache Tribe v. United States,* 657 F. 2d 1126, 1138 (10th Cir. 1981).

CONCLUSION

The district judge awarded a proper water duty to the Newlands Project farmers, properly refused to award a reserved water right of instream flow for Toiyabe National Forest, and properly recognized the primary administrative jurisdiction of the Nevada State Engineer over change applications. We vacate the water duty awarded the United States, for the benefit of fishing and recreation, pending further proceedings on the important legal and factual issues implicit in the matter.

AFFIRMED AS MODIFIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-4084, 81-4116

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

ALPINE LAND & RESERVOIR CO., et al.,

Defendants-Appellees.

ORDER

(Filed April 1, 1983)

Appeal from the United States District Court
for the District of Nevada

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges.

The petition of the Pyramid Lake Paiute Tribe of Indians for intervention, or in the alternative for substitution, is denied.

APPENDIX C

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Plaintiff,

vs.

Rogers C. B. MORTON, Secretary of the Interior,

Defendant.

Civ. A. No. 2506-70.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Nov. 8, 1972.
As Amended Nov. 29, 1972.

Supplemental Opinion Feb. 20, 1973.

Indian tribe brought action challenging regulation issued by the Secretary of the Interior with respect to diversion of water from river flowing into reservation, and seeking a declaration of rights and affirmative injunctive relief. The District Court, Gesell, J., held, inter alia, that where suit brought by Indian tribe was pending and tribe had asserted wellfounded rights in waters flowing into reservation and feeding lake upon which tribe depended for its livelihood, it was not the function of the Secretary of the Interior in determining how much water could be diverted for irrigation purposes prior to reaching the reservation, under applicable court decrees and contract with irrigation district, to attempt an accommodation based on a "judgment call"; rather, burden rested on the Secretary to justify with precision any diversion of water from the tribe and to insure, to the extent of his power, that all

water not obligated by court decree or contract with the district go into the lake.

Order accordingly.

1. Indians

Where the Secretary of the Interior, prior to issuance of regulation specifying how much water could, under court decrees and contract with irrigation district, be diverted from river prior to point where it flowed into Indian reservation and fed lake relied upon by many Indians for their livelihood, had before him various written recommendations from interested agencies and experts but did not accept any particular recommendation, and where record, in action by Indian tribe challenging the regulation, was devoid of any explanation or indication of factors taken into account, the Government failed to meet its burden of establishing that the Secretary's decision was anything but arbitrary. 5 U.S.C.A. § 706.

2. Indians

Where suit brought by Indian tribe was pending and tribe had asserted well-founded rights in waters flowing into reservation and feeding lake upon which tribe depended for its livelihood, it was not the function of the Secretary of the Interior in determining how much water could be diverted for irrigation purposes prior to reaching the reservation, under applicable court decrees and contract with irrigation district, to attempt an accommodation based on a "judgment call"; rather, burden rested on the Secretary to justify with precision any diversion of water from the tribe and to insure, to the extent of his power,

that all water not obligated by court decree or contract with the district go into the lake. 5 U.S.C.A. § 706.

3. Indians

The conduct of the United States as disclosed in the acts of those who represent it in dealings with Indians, should be judged by the most exacting fiduciary standards. 25 U.S.C.A. §§ 174, 476; 43 U.S.C.A. § 614c.

4. Indians

Government undertakings with Indians are to be liberally construed to the benefit of the Indians.

5. Indians

It was not enough for the United States to assert water and fishing rights of Indian tribe by filing suit in the United States Supreme Court; rather, the Secretary of the Interior in authorizing diversion, pursuant to court decrees and contract with irrigation district, of waters which would otherwise flow into reservation was obliged to exercise his statutory and contractual authority to the fullest extent possible in recognition of his fiduciary duty to the tribe and to formulate a closely developed regulation that would preserve water for the tribe.

6. Indians

Where diversion of water from river which flowed into Indian reservation was governed by two overlapping court decrees, the Secretary of the Interior, in promulgating a regulation governing the amount of diversion for a particular year, was obliged to take both decrees into ac-

count rather than to rely solely on the larger quantities provided by one of the decrees. 5 U.S.C.A. § 706.

7. Indians

In light of trust responsibilities of the Secretary of the Interior to Indian tribe, and under contract between Secretary and irrigation district giving the Secretary right to require the district to conduct its affairs in a nonwasteful manner, failure in regulation specifying amount of water which could be diverted to irrigation district from river at point before river flowed into reservation and fed lake upon which tribe depended for its livelihood to take adequate steps to prevent improper and wasteful use of diverted water constituted agency action unlawfully withheld and unreasonably delayed, within statute authorizing court to compel such agency action. 5 U.S.C.A. § 706(1).

8. Indians

In promulgating regulation pursuant to court decrees and under contract with irrigation district specifying amount of water which could be diverted during year to the district from river which flowed into Indian reservation and fed lake upon which Indians depended for their livelihood, the Secretary of the Interior was obliged, in light of his trust responsibilities to tribe, to provide effective means, as authorized by his contract with the district, to measure water use, minimize unnecessary waste and delivery of water to land not entitled under the decrees, and to assure compliance by the district.

9. Indians

Where management of waters stored in reservoir would have effect on amount of water received by lake in reservation on which Indian tribe depended for their livelihood, ambiguous contract between the Bureau of Reclamation and the United States Forest Service with respect to the reservoir, made without consultation with the tribe, could not be interposed as an obstacle to the lake receiving the maximum benefit from the reservoir which might be available under reasonable and proper interpretation of court decrees; in this respect, the trust obligations of the Secretary of the Interior to the tribe were paramount. 5 U.S.C.A. § 706.

10. Indians

New construction programs to be financed with Government funds not yet appropriated, effective several years in the future, would not suffice to satisfy trust obligations of the Secretary of the Interior to assure delivery of sufficient water to lake within Indian reservation to maintain level of lake, nor obligation to comply with applicable court decrees. 5 U.S.C.A. § 706.

Robert S. Pelcyger, Boulder, Colo., Robert D. Stitser, Reno, Nev., Reid Peyton Chambers, Los Angeles, Cal., L. Graeme Bell, III, Washington, D. C., for plaintiff.

Donald W. Redd, Douglas N. King, Department of Justice, Washington, D. C., for defendant.

MEMORANDUM OPINION

GESELL, District Judge.

This is an action by a recognized Indian tribe challenging a regulation issued by the Secretary of the Interior. The matter came before the Court for trial without a jury following an extended period of pretrial activity during which issues were narrowed and efforts to resolve the controversy by negotiation failed. Claiming that the regulation should be set aside as arbitrary, capricious, and an abuse of the Secretary's authority, the Tribe invokes applicable provisions of the Administrative Procedure Act, 5 U. S. C. § 706. A declaration of rights and affirmative injunctive relief is also sought on the ground the Secretary has unlawfully withheld and unreasonably delayed required actions, 5 U. S. C. § 706(1).

The Court's jurisdiction to review the challenged regulation under the Administrative Procedure Act is not contested. The Tribe is an aggrieved party directly affected by the regulation and is proceeding in good faith. The controversy is ripe and immediate. All administrative remedies have been exhausted and the Secretary's action is final.

The regulation was signed by the Secretary on September 14, 1972, appears in the Federal Register, 37 Fed. Reg. 19838, and became effective November 1, 1972. It is designed to implement pre-existing general regulations[1] by establishing the basis on which water will be provided

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[1] 43 C. F. R. § 418 (1972).

during the succeeding twelve months to the Truckee-Carson Irrigation District, which is located in Churchill County, Nevada, some 50 miles east of Reno. The Tribe contends that the regulation delivers more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake located on the Tribe's reservation.

This Lake has been the Tribe's principal source of livelihood. Members of the Tribe have always lived on its shores and have fished its waters for food. Following directives of the Department of Interior in 1859, which were confirmed by Executive Order signed by President Grant in 1874, the Lake, together with land surrounding the Lake and the immediate valley of the Truckee River which feeds into the Lake, have been reserved for the Tribe and set aside from the public domain. The area has been consistently recognized as the Tribe's aboriginal home. *See* United States v. Sturgeon, 27 F. Cas. 1357, No. 16,413 (D. Nev. 1879), aff'd, 27 F. Cas. 1358; United States v. Walker River Irr. Dist., 104 F. 2d 334 (9th Cir. 1939).

Recently, the United States, by original petition in the Supreme Court of the United States, filed September, 1972, claims the right to use of sufficient water of the Truckee River for the benefit of the Tribe to fulfill the purposes for which the Indian Reservation was created, "including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee as a natural spawning ground for fish and other purposes beneficial to and satisfying the needs" of the Tribe. United States v. States of Nevada and California, (No. 59 Original, October Term 1972), complaint at 14.

Appended to this Memorandum Opinion is a map which shows the available sources of water supply in relationship to Pyramid Lake and the District. The area involved is a water shortage area characterized by seasonal and yearly variations in available supply. Beneficial irrigation for farming and other uses within the District are accommodated through some 600 miles of main water ditches and drains and the water is ultimately parcelled out through 1,500 delivery points. The water fed into this system comes from the Carson River following storage in Lahontan Reservoir and by diversion of water from the Truckee River at Derby Dam where it passes through the Truckee Canal to be stored in the Lahontan Reservoir for subsequent or simultaneous release. The Secretary entered into a contract with the District in 1926 and this contract is still in effect (Def. Ex. 2).

As the map so clearly shows, any water diverted from the Truckee at Derby Dam for the District is thereby prevented in substantial measure from flowing further north into Pyramid Lake. The Lake is a unique natural resource of almost incomparable beauty. It has no outflow, and as a desert lake depends largely on Truckee River inflow to make up for evaporation and other losses. It is approximately five miles wide and twenty-five miles long and now has a maximum depth of 335 feet. Although the Lake has risen a few feet in recent years, it has dropped more than 70 feet since 1906. A flow of 385,000 acre feet of water per year from the Truckee River into the Lake is required merely to maintain its present level. The decreased level and inflow have had the effect of making fish native to the Lake endangered protected species, and have unsettled the erosion and salinity balance of the Lake to a point

where the continued utility of the Lake as a useful body of water is a hazard.[2]

The regulation under attack is the most recent of a series of regulations issued from year to year since 1967 pursuant to general policies established by the Secretary (see 43 C. F. R. Part 418 (1972) and Def. Ex. 3). The Tribe contends that the Secretary's action is an arbitrary abuse of discretion in that the Secretary has ignored his own guidelines and failed to fulfill his trust responsibilities to the Tribe by illegally and unnecessarily diverting water from Pyramid Lake.

The focus of the inquiry has been to determine whether the 378,000 acre feet of water which the regulation contemplates will be diverted from the Truckee River at Derby Dam may be justified on a rational basis. This determination must be made in the light of three major factors which necessarily control the Secretary's action: namely, the Secretary's contract with the District, certain applicable court decrees, and his trust responsibilities to the Tribe. The Secretary and the Tribe are in substantial agreement that these are the factors to be weighed. The issue, therefore, comes down to whether or not the Secretary's resolution of conflicting demands created by these factors was effectuated arbitrarily rather than in the sound exercise of discretion.

The Court has carefully reviewed the processes by which the Secretary arrived at the disputed regulation.

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[2]Native fish which naturally spawn in the Truckee can no longer do this and the Lake must be stocked at least until 1974 when construction to permit the fish again to pass into the river for spawning is to be completed.

The Secretary had before him various written recommendations from interested agencies and experts, including responsible expert studies presented by the Tribe.[3] There was a wide variation in these recommendations suggesting diversion of water in varying amounts ranging from 287,000 acre feet to 396,000 acre feet. All purported to be made on the basis of guidelines and policies previously set by the Secretary. After reviewing these written submissions, the Secretary conferred with the Assistant Secretary for Water and Power Resources (with authority over the Bureau of Reclamation) and the Assistant Secretary for Public Land Management (with authority over Indian Affairs) and made what one of these Assistants characterized as a "judgment call." It is affirmatively stated that the Secretary did not accept the reommendation of any particular person or group. The record, therefore, is completely devoid of any explanation or indication of the factors or computations which he took into account in arriving at the diversion figure of 378,000 acre feet. The grounds of his action are therefore not disclosed and there is no way of knowing the basis on which his conclusions rested. Since the record is as complete on this score as it ever can be, the Government has failed to meet its burden of establishing that this decision was anything but arbitrary. *See* Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971); DeVito v. Shultz, 300 F. Supp. 381 (D. D. C. 1969).

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[3]Commissioner of Indian Affairs, Bureau of Reclamation, Geological Survey, the Fish and Wildlife Bureau, Clyde-Criddle-Woodward, Inc., and Woodward-Clevenger & Associates, Inc., among others.

Furthermore, while the Secretary's good faith is not in question, his approach to the difficult problem confronting him misconceived the legal requirements that should have governed his action. A "judgment call" was simply not legally permissible. The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. This suit was pending and the Tribe had asserted well-founded rights. The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.[4] The United States, acting through the Secretary of Interior, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U. S. 286, 297, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480 (1942); Navajo Tribe of Indians v. United States, 364 F. 2d 320, 176 Ct. Cl. 502 (1966).

The vast body of case law which recognizes this trustee obligation is amply complemented by the detailed statutory scheme for Indian affairs set forth in Title 25 of the United States Code.[5] Undertakings with the Indians are

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[4]The Secretary's own regulations recognize his trustee obligations. 43 C. F. R. §§ 418.1(b) and 418.3(a) (1972).

[5]*E. g.*, 25 U. S. C. §§ 174 and 476; *see* 43 U. S. C. § 614c.

to be liberally construed to the benefit of the Indians, and the duty of the Secretary to do so is particularly apparent. It is not enough to assert the water and fishing rights of the Tribe by filing a suit in the United States Supreme Court.

The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. Difficult as this process would be, and troublesome as the repercussions of his actions might be, the Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given each interest before him. Possible difficulties ahead could not simply be blunted by a "judgement call" calculated to placate temporarily conflicting claims to precious water. The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law.

The record before the Court clearly establishes the underlying defects and arbitrary nature of the challenged regulation. The Secretary erred in two significant respects. First, he disregarded interrelated court decrees, and, second, he failed to exercise his authority to prevent unnecessary waste within the District. The effect of this is to deprive the Tribe of water without legal justification.

Two decrees of the United States District Court for the District of Nevada, known as the Orr Water Ditch

and Alpine decrees, govern the amounts and conditions under which water shall be available for beneficial uses in the District. Maximums of roughly 4.5 acre feet and 2.92 acre feet measured at farm headgates are provided in the Orr and Alpine decrees, respectively. Approximately 60-75 percent of the water needed to serve the District's 60,000 acres of land is covered by the Alpine decree, and the remaining needed water is covered by the Orr decree. The parties and this Court of course recognize that neither the Secretary nor this Court can adopt or require a regulation that would infringe upon these decrees, and their interpretation and application is, in a number of respects, uncertain. Nonetheless, regardless of ambiguities and inconsistencies, as the Secretary himself recognized in his own guidelines and regulations, 43 C. F. R. § 418.3 (1972), he was required to take both decrees into account. The evidence demonstrates conclusively that the Secretary formulated the regulation by totally ignoring the Alpine decree and must have reached his calculations by relying solely on larger quantities provided by the Orr Water Ditch decree.

In addition, the evidence conclusively showed that the regulation is wholly inadequate to prevent waste within the District, causing substantial and wholly unnecessary diversion of water from the Truckee River to the obvious detriment of the Tribe. It was amply demonstrated that water could be conserved for Pyramid Lake without offending existing decrees or contractual rights of the District through better management which would prevent unnecessary waste. The amount of exposed water can be reduced to limit exaporation. Better management will lessen seepage and overflow; users can be assessed for

water taken; techniques exist for measuring water more efficiently at headgates; land not entitled to water under the decrees and contract with the District can be prevented from taking the water; and by the mere employment of a few individuals the system can be so policed that it will function on a basis consistent with modern water control practices. All of this can be accomplished in spite of the fact that the District has an antiquated system. Failure to take appropriate steps, under the circumstances, by the regulation constitutes agency action unlawfully withheld and unreasonably delayed when viewed in the light of the Secretary's trust responsibilities to the Tribe, 5 U. S. C. § 706(1).

Under the contract between the Secretary and the District Secretary has the right to require the District to conduct its affairs in a non-wasteful manner but no such action was taken or is contemplated in the regulation.[6] The operations of the District are not tightly controlled and water is taken practically on demand without necessary safeguards to prevent improper and wasteful use. This failure to act must be given particular emphasis since the proof showed that the Secretary has not in the past enforced his prior yearly regulations affecting the District and has acquiesced in excessive water deliveries to the farms. Moreover, the absence of effective enforcement provisions in the challenged regulation must

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[6]The regulation, even within its four corners, showed a disregard for close, careful management and control. The month-to-month operating criteria set out in the regulation were prepared to accommodate a diversion of 406,000 acre feet and were not modified or adjusted when the lesser diversion of 378,000 acre feet was provided. This alone could save some 30,000 acre feet for the Tribe.

be considered in the light of a formal statement by the District that it will disregard the new regulation and will divert water as it chooses by giving instructions to its own water masters (Def. Ex. 9).

The regulation is arbitrary, capricious, an abuse of discretion and not in accordance with law. A different basis for determining the amount of water to be diverted at Derby Dam is required. There is need to consider appropriate relief. Obviously some standard for regulating the water flow to the District must be in effect. In the approaching winter months there will be less strain than will arise commencing in early spring. It therefore appears appropriate to permit the regulation to remain in effect until February 1, 1973, and to direct appropriate action in the interim which will place the management and distribution of the water under more appropriate control before serious seasonal demands become apparent.

Accordingly, the Court directs that on or before January 1, 1973, the Secretary shall submit to this Court a proposed amended regulation which is in conformity with the findings of fact and conclusions of law set forth in this Memorandum Opinion. The amendment shall provide, among other things, an effective means to measure water use, to minimize unnecessary waste, to end delivery of water within the District to land not entitled under the decrees, and to assure compliance by the District. Proper weight shall be given to both the Orr Water Ditch and Alpine decrees and the amount of water diverted shall be wholly consistent with the Secretary's fiduciary duty to the Tribe.

In this connection, the Court has noted that the manner in which the Secretary chooses to manage and commit

water stored in Stampede Reservoir will have an effect on the situation. Inasmuch as the contract between the Secretary and the Department of Agriculture relating to Stampede bears on this aspect of the problem, the Court notes that the contract is ambiguous in its terms and was made without consultation with the Tribe. This contract cannot be interposed as an obstacle to the Lake receiving the maximum benefit from the upper Truckee flow into Stampede which may be available under a reasonable and proper interpretation of the decrees. The Secretary's trust obligations to the Tribe are paramount in this respect.

In the event the amended regulation fails to assure at least the delivery of 385,000 acre feet of water to Pyramid Lake, the Secretary shall accompany the regulation with a full, detailed, factual statement of the reasons why this result has not been achieved, together with a specific itemized plan indicating what further action will be taken consistent with the Orr Water Ditch and Alpine decrees to accomplish this result in the immediate future. New construction programs to be financed with Government funds not appropriated, effective four or five years from now, will not suffice.

Counsel shall submit an appropriate order consistent with these declarations, findings of fact and conclusions of law within ten days.

(Map omitted from the Appendix)

ORDER

This cause having duly come on for trial on the 24th, 25th and 26th days of October, 1972, proof having been presented on behalf of the respective parties, the parties

having appeared by their respective attorneys, the Court being fully advised in the premises, and a Memorandum Opinion dated November 8, 1972, having been rendered incorporating the Court's Findings of Fact and Conclusions and Declarations of Law, it is hereby

Ordered, adjudged and decreed that:

1. The Operating Criteria and Procedures for the Truckee and Carson Rivers for the period November 1, 1972, through October 31, 1973, promulgated by the Secretary of the Interior on September 14, 1972, 37 Fed.Reg. 19838, are unlawful.

2. Said Operating Criteria and Procedures are hereby set aside effective February 1, 1973.

3. The Secretary of the Interior is directed to submit to the Court on or before January 1, 1973, proposed amended Operating Criteria and Procedures for the Truckee and Carson Rivers for the period ending October 31, 1973, which shall conform to the Findings of Fact and Conclusions of Law set forth in the Court's November 8, 1972, Memorandum Opinion.

4. Said amended Operating Criteria and Procedures shall be accompanied by a detailed explanation of the factors or computations which the Secretary takes into account in arriving at the maximum diversion figure set forth in said amended Operating Criteria and Procedures.

5. Said amended Operating Criteria and Procedures shall be wholly consistent with the Secretary's fiduciary duty to the plaintiff and give proper weight to the maximum farm headgate entitlements of both the Orr Water Ditch and Alpine decrees.

6. Said amended Operating Criteria and Procedures shall provide, among other things, for effective means to measure water use, to minimize unnecessary waste, to end delivery of water within the Truckee-Carson Irrigation District to land not entitled under the decrees, and to assure compliance by the District with the amended Operating Criteria and Procedures.

7. In the event the amended Operating Criteria and Procedures will fail to assure the delivery of at least 385,000 acre feet of water to Pyramid Lake for the twelve months ending October 31, 1973, the Secretary of the Interior is directed to accompany the Operating Criteria and Procedures with a full, detailed, factual statement of the reasons why this result has not been achieved, together with a specific itemized plan indicating what further action will be taken consistent with the Orr Water Ditch and Alpine decrees to accomplish this result in the immediate future.

8. The contract of June 29, 1970, between the Bureau of Reclamation and the United States Forest Service (Plaintiff's Exhibit 8) cannot be interposed as an obstacle to Pyramid Lake receiving the maximum benefit from the upper Truckee flow into Stampede Reservoir which may be available under a reasonable and proper interpretation of the applicable decrees.

9. Plaintiff shall submit any opposition to the amended Operating Criteria and Procedures on or before January 10, 1973. A hearing on the amended Operating Criteria and Procedures will be held on January 24, 1973, at 9:30 a.m. if requested by either party on or before January 15, 1973.

MEMORANDUM

During the pendency of this litigation, the Secretary placed into effect Operating Criteria to govern the water year ending October 31, 1973, it being understood that these criteria would be subject to possible revision and change based on the determinations of the Court. The Court has today entered a Judgment and Order approving different Operating Criteria which the Court finds more consistent with the Secretary's legal and fiduciary obligations to the Tribe. The parties are in accord with respect to many aspects of the approved Operating Criteria, but the Court has had to resolve controversies over other substantial portions.

This Judgment and Order is entered midway in the water year. It will not be practical to implement fully all of its provisions by October 31, 1973. Accordingly, the Court has been obliged to recognize the need for certain interim adjudgments. It has directed that the approved Operating Criteria shall be placed in full force and effect commencing with the next water year, November 1, 1973.

For the current water year the approved Operating Criteria will be generally applicable and the Secretary must take immediate steps to put them into effect. Since some aspects will require time to implement, the Court is authorizing the Secretary to divert more water to aid transition.

In selecting 350,000 acre-feet for diversion during the present water year, rather than the 288,120 acre-feet specified for the following water year, the Court has acceded to the Secretary's representations that this amount will

enable a more gradual transition and in view of current weather conditions will not substantially deprive the Tribe of water for Pyramid Lake. The Tribe has not accepted the figure of 350,000 acre-feet, but did agree that more diversion than 288,129 acre-feet should be permitted for the current year. The Judgment and Order also makes certain additional changes in the approved criteria for the immediate period ahead in recognition of this larger diversion.

The Court's role in these proceedings has focused on the Operating Criteria in effect since November 1, 1971. The proof showed, however, that the Secretary has followed the practice of more or less renewing similar or identical criteria from year-to-year. As these proceedings have gone forward, the Secretary has indicated an increasing willingness to take actions in aid of Pyramid Lake. While some adjustments in Operating Criteria may be necessary after October 31, 1974, to accommodate changing conditions, there is no reason to believe from the record before the Court that the general standards established by the Court's Judgment and Order should otherwise change. The Secretary's fiduciary obligations will not alter and his continuing duty actively to supervise and upgrade the Newlands Project and to provide maximum water for Pyramid Lake will not change. It is to be hoped that new litigation can be avoided by the Secretary's assiduous attention to his responsibilities in this regard.

JUDGMENT AND ORDER

The Court having filed its Memorandum Opinion of November 8, 1972, after giving full opportunity to the parties to fashion appropriate relief and having considered the proposed relief of each party, it is hereby

Ordered, adjudged and decreed that:

(1) The Secretary's Operating Criteria setting forth procedures for coordinating operation and control of the Truckee and Carson Rivers to provide service to the Newlands Project now in effect are arbitrary and an abuse of his discretion.

(2) The Court declares that Operating Criteria in the form attached to this Judgment and Order are necessary and appropriate to fulfill the Secretary's fiduciary and legal obligations to the Tribe.

(3) The Secretary shall immediately publish this Judgment and Order, and publish and implement and enforce the attached Operating Criteria for the water year commencing November 1, 1973, and for the current water year ending October 31, 1973, provided, however, for the current water year only, he may divert up to 350,000 acre-feet for the twelve months ending October 31, 1973, and he shall disregard the detailed provisions of Sections A and B and in lieu thereof comply with the following requirements:

A(1) 50,000 acre-feet of water presently stored in Stampede Reservoir will be credited to the Truckee-Carson Irrigation District to be used by it in the event the water stored in Lahontan Reservoir shall fall below 80,000

acre-feet and it appears that it is necessary to draw upon this water to meet the needs within the allowable maximum total diversion of the Truckee-Carson Irrigation District for this water year.

(2) Subject to the provisions of Section A(1), diversions from the Truckee River for the Truckee-Carson Irrigation District shall be limited to the needs of the Truckee division.

(3) Maximum storage of water in Stampede Reservoir shall be required. Releases shall be limited insofar as possible consistent with existing decrees, flood control requirements and for the purposes of assisting fishery experiments as approved by the Secretary after consultation with the Tribe and the Bureau of Sport Fisheries and Wildlife.

(4) Nothing in this Judgment and Order shall constitute an interpretation or modification of either the Alpine or Orr Water Ditch decrees, nor shall it be deemed to affect the rights of any person under either of such decrees, so long as they remain in effect.

(5) Nothing in the Judgment and Order shall be deemed to prevent any change in the Operating Criteria that may be agreed between the parties, in writing, or ordered by the Court, after notice.

OPERATING CRITERIA AND PROCEDURES FOR COORDINATED OPERATION AND CONTROL OF THE TRUCKEE AND CARSON RIVERS FOR SERVICE TO NEWLANDS PROJECT

The water supply diversions to the Truckee-Carson Irrigation District from both the Truckee and Carson

Rivers shall be limited to the amount needed for agricultural purposes, not exceeding 288,129 acre-feet, if available, for the twelve months ending October 31, 1974. The water supply diversions shall be measured at the gauging station below Lahontan Dam and at diversion points along the Truckee Canal.

All use of water for power generation shall be incidental to either agricultural use or precautionary drawdown or spill.

In satisfying the diversion for agricultural purposes, maximum use will be made of Carson River water and diversions through the Truckee Canal will be minimized.

Stampede Reservoir shall be operated by the United States to provide flood control, fish and wildlife, and recreation benefits and to store water for possible agricultural use by the Truckee-Carson Irrigation District. The operation of Stampede Reservoir will be coordinated with the operation of Lake Tahoe, Prosser Creek Reservoir, and Boca Reservoir to avoid infringing upon the Floristan Rates or water rights established by existing degrees and agreements.

In all of the operations, Truckee Canal will be operated to the maximum extent practical with the objective of maintaining minimum terminal flow to Lahontan Reservoir or Carson River during all periods except when criteria herein specifically permits such deliveries. In order to minimize the rates of fluctuation in the Truckee River below Derby Dam the change of flow in Truckee Canal within any 24-hour period shall not exceed 50 cubic feet per second or 20 percent of the flow in the Truckee River below Derby, whichever is greater.

During periods of spill or precautionary drawdown of Lahontan Reservoir, the District will be charged only with the predetermined schedule of irrigation releases to be passed at the gauging station below Lahontan Reservoir plus measured diversions from the Truckee Canal and Rock Dam Ditch.

The operation of Stampede Reservoir, Derby Diversion Dam, Truckee Canal, and Lahontan Reservoir will be conducted in accordance with the following criteria in order to minimize diversions from the Truckee River through the Truckee Canal.

SECTION A

Truckee Diversion Criteria

Subject to conditions specified in Section B (Storage Credit at Stampede), the diversions of water from the Truckee River into and through the Truckee Canal will be governed by the following criteria:

(1) If available, sufficient water will be diverted into Truckee Canal to meet direct agricultural requirements along the Truckee Canal.

(2) Diversions through the Truckee Canal into Lahontan Reservoir will be made in accordance with the following tabulation:

(Table omitted.)

SECTION B

Storage Credit at Stampede

As a means of minimizing the diversions of Truckee River water for use on the Carson Division of the Truckee-Carson Irrigation District or for storage in La-

hontan Reservoir and at the same time ensuring that the District shall receive exactly the same total amount of water for its beneficial use as otherwise, the following modifications shall be applied to the criteria in Section A (Truckee Diversion Criteria):

(1) The storage levels in Lahontan Reservoir specified as limits for starting and stopping diversions of water for storage in Lahontan or use on the Carson Division shall be converted to acre-feet and applied to the sum of water in storage at Lahontan Reservoir and water in Stampede Reservoir credited to the Truckee-Carson Irrigation District using the most up-to-date area-capacity curve for each reservoir.

(2) The combined storage facilities on the upper Truckee River will be operated in a manner consistent with the applicable decrees and so as to maintain the Floristan Rates with the objective of maximizing the accumulation of storage in Stampede Reservoir.

(3) Whenever there is an adequate amount of uncommitted water in Stampede Reservoir the Truckee-Carson Irrigation District shall forego the diversion of water into the Truckee Canal for storage in Lahontan Reservoir or for use on the Carson Division and shall accept credit in Stampede Reservoir for the amount of water it otherwise would have diverted. For the purposes of this subsection, an adequate amount of uncommitted water (consisting of not less than 50,000 acre-feet) will be deemed to have accumulated in Stampede Reservoir no later than February 1, 1974.

(4) The sum of the amount of water stored in Lahontan Reservoir plus the amount of water stored in Stampede Reservoir and credited to the Truckee-Carson Irrigation District shall not be allowed to exceed the

storage capacity of Lahontan Reservoir below elevation 4163.67 feet above mean sea level (317,300 acre-feet), and this limit shall be preserved, if necessary, by the reduction of credit in Stampede Reservoir. When the amount of water credited to the Truckee-Carson Irrigation District is so reduced, the amount of that reduction shall be credited for the purpose of maintaining the minimum rates of flow below Derby Dam provided in Section B(7) of these Operating Criteria and Procedures.

(5) Whenever the water surface elevation of Lahontan Reservoir is at or below elevation 4129.28 feet (80,000 acre-feet) above mean sea level during the irrigation season, water will be released from Stampede Reservoir to be diverted into and through the Truckee Canal for agricultural use by the Truckee-Carson Irrigation District in either or both the Truckee and Carson Divisions. The total amount of the release shall be limited to the lesser of the amount credited to the Truckee-Carson Irrigation District or the amount needed to supplement the 80,000 acre-feet of water in Lahontan Reservoir to meet the remaining seasonal agricultural requirements of the Truckee-Carson Irrigation District.

(6) From February 1, 1974, the District will be credited with an initial 50,000 acre-feet of water in Stampede. In addition to this amount, the District will be credited with the accumulated storage in excess of 5915.0 feet above mean sea level (127,600 acre-feet) in accordance with B(3) above.

(7) Insofar as possible consistent with existing decrees and with maintaining the Floristan Rates and with Operating Criteria and Procedures Sections B(1) through B(6), Stampede Reservoir (as well as the other storage facilities on the upper Truckee River) shall be operated

with the objective of maintaining the following minimum rates of flow for fish, wildlife and recreation purposes in the Truckee River below Derby Dam measured at the Nixon gauge:

March 1—May 15	600 cubic feet per second
May 16—September 15	300 cubic feet per second
September 16—Feb. 28	150 cubic feet per second

(8) At the conclusion of the water year, October 31, 1973, the District shall retain as minimum carry-over credit in Stampede Reservoir for the 1974 water year the quantity of Truckee River water that it would have been able to divert to Lahontan Reservoir in the absence of its storage credit at Stampede. In addition, the Secretary of the Interior, in consultation with the Pyramid Lake Paiute Tribe of Indians and the Bureau of Sport Fisheries and Wildlife with respect to the requirements of the Pyramid Lake fishery, will determine: (1) the portion of the remaining storage in Stampede Lake allocated for releases to Pyramid Lake, and (2) the portion of the remaining storage in Stampede Reservoir to be allocated to the District as additional carry-over storage credit for the 1974 water year.

(9) Nothing in sections B(1) through B(8) of these Operating Criteria and Procedures shall in any way infringe on or interfere with the flood control function of Stampede Reservoir.

SECTION C

As a means of insuring that the amount of water diverted is limited to that prescribed for beneficial agricultural use, the Truckee-Carson Irrigation District shall:

(1) Deliver water only to lands for which the District has in advance established to the satisfaction of the Secretary or his designee that a current valid water right exists.

(2) Establish a single water operations center which will coordinate all orders for delivery of water to individual turnouts and which then will dispatch flows in the distribution systems so as to meet the water orders with minimum spill from the distribution system.

(3) Permit only authorized District employees to open and close individual turnouts and operate the distribution system facilities.

(4) Establish and operate sufficient stations for the measurement of all surface waters flowing out of the Truckee, North Carson, and South Carson Divisions.

(5) Initiate immediately a program for improving the measurement of the amounts of water delivered to individual turnouts. The program shall include the installation of measuring devices on at least 10 percent of the total turnouts in 1973; the program shall concentrate first on the combinations of large users and currently poor measurements; and the installed devices must be approved by the U. S. Geological Survey and the Bureau of Reclamation.

(6) Submit to the Project Office of the Bureau of Reclamation a monthly report by the 15th of the following month for each of the three divisions showing the total water delivery in acre-feet and the maximum, minimum and mean daily outflow in cubic feet per second. Reports showing the amount of water in acre-feet delivered to each farm each month during the water year shall be made at least twice during the calendar year. These

reports shall be circulated to the Tribe and the members of the Truckee-Carson Operating Criteria and Procedures Committee.

(7) By June 30, 1973, establish a system, to become effective November 1, 1973, for charging water users for the quantity of water delivered to their turnouts. The system shall be designed: (a) to provide a reasonable financial incentive for economical and efficient use of water; and (b) to produce revenue against the District's operation and maintenance expenses and to assist the discharge of its debt to the United States.

SECTION D

(1) Article 32 of the December 18, 1926, contract between the United States and the District will be invoked by the Secretary for substantial violations of these Operating Criteria and Procedures and the Secretary reserves all other rights and options to enforce these criteria.

(2) If the Secretary determines that waste has occurred through negligence or inattention, after written notice the amount of such waste shall be deducted from the District's allowable maximum total diversion.

(3) The District shall not deliver water to users who do not comply with all of the terms and provisions of these Operating Criteria and Procedures. Such deliveries shall not resume without the prior approval of the Secretary or his designee.

(4) The Secretary shall not approve any applications for transfers of water rights within the Newlands Project pursuant to 43 U. S. C. § 439 unless he finds that the District is in compliance with all of the terms and pro-

visions of these Operating Criteria and Procedures and that the applicants for such transfers are in compliance with these Operating Criteria and Procedures and with the applicable decrees. Transfers of water rights shall be restricted to the extent that there shall be no enlarged consumptive use of water within the lands of the Newlands Project.

(5) All of the water delivery operations of the Truckee-Carson Irrigation District shall be monitored closely by the Bureau of Reclamation. Any and all violations of the terms and provisions of these Operating Criteria and Procedures shall be reported immediately by the District to the Project Office of the Bureau of Reclamation.

APPENDIX D

TRUCKEE-CARSON IRRIGATION DISTRICT
Newlands Project
P.O. Box 1356
Fallon, Nevada 89406
Telephone (702) 423-2141

May 19, 1981

Honorable James G. Watt
Secretary of the Interior
United States Department of
the Interior
C Street between 18th and 19th, N. W.
Washington, D. C. 20240

RE: *Truckee-Carson Irrigation District and the Newlands Reclamation Project in the State of Nevada*

Dear Secretary Watt:

Truckee-Carson Irrigation District is an irrigation district duly organized under Nevada law. It operates the federal Newlands Reclamation Project pursuant to a December 18, 1926 contract entered into with the United States. The project is situated in Northern Nevada, and its sources of water are the Truckee and Carson Rivers. It was the first (or one of the first) federal reclamation projects constructed following the enactment of the Reclamation Act of 1902. It is basically cattle oriented, and there are 73,002 acres of project water right land owned and farmed by ap-

proximately 2,200 individual farmers, almost all of whom live on their land and farm it themselves.

While most of the project lands are in the Carson River watershed the flow of that river is insufficient to satisfy irrigation demands, and therefore one of the primary features of the Newlands Reclamation Project was the construction of Derby Dam on the Truckee River some 25 miles below Reno and 30 miles upstream from Pyramid Lake. Derby Dam permits diversion of waters from Lake Tahoe and the Truckee River into the Truckee Canal leading to the project's Lahontan Reservoir, which has a capacity of 317,280 acre-feet, and is located on the Carson River.

The rights to the use of the waters of the Truckee River and its tributaries in Nevada are set forth in the September 8, 1944 Final Decree entered in the case of *United States of America v. Orr Water Ditch Company, et al.*, Equity Docket No. A-3, United States District Court for the District of Nevada (hereinafter the *Orr Ditch* case).

The rights to the use of the waters of the Carson River and its tributaries in Nevada (and California) are now set forth in the December 18, 1980 Final Decree entered in the case of *United States of America v. Alpine Land & Reservoir Company, et al.*, Equity Docket No. D-183, United States District Court for the District of Nevada[1] (hereinafter the *Alpine* case). Each of the decrees specify a delivered-to-the-land water duty on the Newlands Reclamation Project of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands, with a priority

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[1]Prior to the entry of that December 18, 1980 Final Decree, these rights to the use of the waters of the Carson River had been administered by the Court's watermaster pursuant to a Preliminary Determination and Adjudication and Temporary Restraining Order entered on March 24, 1950.

of July 2, 1902.[2] The Court has also provided for and appointed a single watermaster to administer those decrees and enforce their respective provisions.

It should also be noted that in the December 18, 1980 Final Decree entered in the *Alpine* case and in the Court's Opinion entered in that case on that date, the Court determined that the water rights on the Newlands Reclamation Project are appurtenant to the lands irrigated, and that these water rights are owned by the individual landowners, that is, the farmers and *not* by the United States.

With these comments in mind I would like to outline some past events.

In the early 1960's a desire to substantially increase the flows of Truckee River water to Pyramid Lake for fishery purposes became a major concern of the Pyramid Lake Paiute Tribe of Indians and the Bureau of Indian Affairs within the Department of the Interior. Various committees and task forces were appointed, all of whom eventually reached the conclusion, in one form or another, that the right to the use of the water for fishery purposes was either nonexistent or at best questionable and that increased flows to Pyramid Lake could not be accomplished without taking water that was presently being used

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[2]While the United States has recently fild (sic) a Notice of Appeal from the December 18, 1980 Final Decree in the *Alpine* case that appeal should not affect the provisions of that decree which established the project water duty of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands. In the *Alpine* case trial the project water duty was tied to beneficial use and it was a pure factual issue, and there was substantial evidence which supported the decreed 3.5 and 4.5 acre-feet per acre project water duty. Our attorneys have advised me that under those circumstances the appellate court would not reweigh the evidence, and that the decreed project water duty of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the banchlands could not be successfully challenged on appeal.

by someone else.[3] Not surprisingly, since Truckee-Carson Irrigation District and the Newlands Reclamation Project farmers were the largest upstream user of those waters, efforts to obtain more Truckee River water for Pyramid Lake were aimed at the Newlands Reclamation Project.

The major effort to take water from the Newlands Reclamation Project surfaced in 1970 when the Pyramid Lake Paiute Tribe of Indians commenced an action against the Secretary of the Interior. This action was filed in the United States District Court for the District of Columbia, and was entitled *Pyramid Lake Paiute Tribe of Indians v. Morton*, Civil Action No. 2506-70. In this action the Tribe contended that Truckee-Carson Irrigation District was releasing from the Truckee Canal and Lahontan Reservoir more

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[3]As to the existence of a water right for increased flows to Pyramid Lake for fishery purposes, in December of 1973 the United States filed an action entitled *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987 JBA, United States District Court for the District of Nevada. The Tribe intervened on behalf of the United States. In this action the United States and the Tribe alleged a so-called "Winters Doctrine" right to the annual use of between 375,000 and 400,000 acre-feet of the waters of the Truckee River for fishery purposes in the lower Truckee River and at Pyramid Lake. The defendants (which included Truckee-Carson Irrigation District, the State of Nevada, Washoe County, the cities of Reno and Sparks, Sierra Pacific Power Company and all the individual users of the waters of the Truckee River and its tributaries in the State of Nevada) denied the existence of that fishery right and further alleged that the United States and the Tribe's claim of right to the use of the waters of the Truckee River for fishery purposes was barred by the doctrine of res judicata (that is, the September 8, 1944, Final Decree in the *Orr Ditch* case). The assigned district court judge (the Honorable J. Blaine Anderson from Idaho) bifurcated the case and tried the res judicata issue and ruled in the defendants' favor and dismissed the action. The United States and the Tribe then appealed to the United States Court of Appeals for the Ninth Circuit. The case has been briefed and argued before that court, and the parties are now awaiting the appellate decision.

irrigation water than it was entitled to release under the final decree in the *Orr Ditch* case and the temporary restraining order in the *Alpine* case. Basically, there was an ambiguity between the September 8, 1944 Final Decree in the *Orr Ditch* case and the March 24, 1950 temporary restraining order in the *Alpine* case. The Final Decree in the *Orr Ditch* case (which concerned the waters of the Truckee River) provided for a Newlands Project water duty of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands while the temporary restraining order (which concerned the waters of the Carson River) provided for a Newlands Project water duty of 2.92 acre-feet per acre. The Tribe contended that this ambiguity should be resolved by applying the lower water duty to most of the project lands, and it urged the District of Columbia Court to order the Secretary to adopt and enforce operating criteria which reflected irrigation releases based on that lower water duty.

Truckee-Carson Irrigation District and the Newlands Reclamation Project farmers were not parties to that action and their interests were not represented in the case.

The case was concluded on February 20, 1973. On that date the District of Columbia Court filed its Judgment and Order and decreed that the Secretary ". . . immediately publish this Judgment and Order and publish and implement and enforce the attached operating criteria. . . ." The Court's Judgment and Order and the attached Operating Criteria (which were prepared by counsel for the Tribe) adopted almost all of the Tribe's contentions and the Newlands Project irrigation releases from the Truckee Canal and Lahontan Reservoir were reduced to 350,000 acre-feet for the water year ending October 31, 1973, and to 288,129 acre-feet for subsequent water years. A number of other conditions which were beyond the ability of the District to meet were imposed on the District by the Operating Criteria. The Operating

Criteria further provided that if Truckee-Carson Irrigation District did not comply with the provisions of the Operating Criteria the Secretary of the Interior was to terminate the District's December 18, 1926 contract with the United States.

The District of Columbia Court did however insert one important provision in its Judgment and Order. That provision stated:

> Nothing in the Judgment and Order shall constitute an interpretation or modification of either the Alpine or Orr Water Ditch decrees, nor shall it be deemed to affect the rights of any person under either of such decrees, so long as they remain in effect.

On March 12, 1973, the Assistant Secretary of the Interior complied with the Court's order and published the Court's Judgment and Order and Operating Criteria for the water year ending October 31, 1973, in the Federal Register (Vol. 38, No. 47). From 1974 to 1978 the Secretary readopted and republished these same Operating Criteria in the Federal Register for those water years, but the District is not aware that they were readopted and republished in the Federal Register by the Secretary for the water years ending October 31, 1979, October 31, 1980, or for the current water year.

These court-imposed Operating Criteria have never been complied with, for Truckee-Carson Irrigation District and the Newlands Reclamation Project farmers' position was (and is), that *their vested rights* to the use of the waters of the Truckee and Carson Rivers cannot be decided by a distant court in an action in which they are not parties. Truckee-Carson Irrigation District has released from the Truckee Canal and Lahontan Reservoir irrigation water in an amount that it and the Nevada District Court's Watermaster concluded the District was entitled to release under the provisions of the final decree in the

Orr Ditch case and the temporary restraining order in the *Alpine* case. These releases have exceeded the releases specified in the Judgment and Order and Operating Criteria imposed on the Secretary by the District of Columbia court. As a result of the District's failure to comply with the court-imposed Operating Criteria, and on September 14, 1973, the Secretary gave notice that the District's contract of December 18, 1926 was to be terminated on October 31, 1974.

Truckee-Carson Irrigation District then commenced an action against the Secretary entitled *Truckee-Carson Irrigation District v. Secretary of the Interior,* Civil No. R-74-34 (BRT), United States District Court for the District of Nevada. In that action the District contends that it and the Newlands Reclamation Project farmers cannot be bound by the court-imposed Operating Criteria, that those Operating Criteria are arbitrary and unreasonable, and that the Secretary's September 14, 1973 notice that the District's contract of December 18, 1926 was to be terminated on October 31, 1974 was invalid. The Pyramid Lake Paiute Tribe of Indians intervened in this action on behalf of the Secretary and the case was tried last year before United States District Judge Bruce R. Thompson, who has recently set the case for oral argument on August 7, 1981.

Notwithstanding the Secretary's purported October 31, 1974 termination of the District's December 18, 1926 contract with the United States, the District has continued to operate the project under that contract, and the United States has agreed that it would not attempt to take possession of the project unless and until it had been authorized to do so by a court of competent jurisdiction.

This brings us to the central point of this letter. As mentioned above, the Final Decree in the *Alpine* case was entered on *December 18, 1980.* We are sure that in light of this decree everyone, including your departmental attorneys, can now agree that the Operat-

ing Criteria for the water year ending October 31, 1981, and for future water years, will have to be substantially changed from the Operating Criteria that the Secretary was ordered to adopt, publish and enforce by the District of Columbia Court in 1973.

Any Operating Criteria for the water year ending October 31, 1981 or for future water years, will have to reflect the project water duty of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands as determined in the September 8, 1944 Final Decree in the *Orr Ditch* case and the December 18, 1980 Final Decree in the *Alpine* case, and *not* the lower water duty of 2.92 acre-feet per acre that was used for 75% of the lands within the project's Carson Division by the District of Columbia Court when it adopted its Operating Criteria in 1973.

Along those same lines, any Operating Criteria for the water year ending October 31, 1981 or for future water years will have to reflect the *uncontradicted evidence* in the recent *Alpine* case trial which established that there are over 9,000 acres of benchlands in the Carson Division of the project and not the zero acres of benchlands for the Carson Division used by the District of Columbia Court, when it adopted its Operating Criteria in 1973.

Further, any Operating Criteria for the water year ending October 31, 1981 or for future water years is going to have to be based on the *uncontradicted evidence* in the recent *Alpine* case trial that there are 73,002 acres of project water right land of which approximately 65,000 acres are irrigated each year rather than the 55,210 acres of irrigated project water right land that was used by the District of Columbia Court when it adopted its Operating Criteria in 1973.

The bottom line is that in light of the December 18, 1980 Final Decree in the *Alpine* case, everyone must now concede that the court-imposed limitation on the releases from the Truckee Canal and Lahontan Res-

ervoir of 288,129 acre-feet for the water year ending October 31, 1981 and for future water years cannot be sustained. The decrees in the *Orr Ditch* and *Alpine* cases now clearly provide for substantially more irrigation releases than the court-imposed 288,129 acre-feet, under *anyone's* computations.

Further, in light of the December 18, 1980 Final Decree and the Court's Opinion in the *Alpine* case that the project water right is appurtanant to the land and owned by the farmers and not by the United States, it would seem obvious that the District of Columbia Court and the Secretary of the Interior lack jurisdiction to impose operating criteria which in fact limit those privately-owned water rights. On this point we would note that a witness for the Secretary of the Interior testified without contradiction in the trial before the District of Columbia Court that the United States owned these water rights. This erroneous testimony was undoubtedly accepted by that Court when it decided to impose its Operating Criteria on the Secretary for enforcement on the District and the project farmers. I do not believe that if that court had been correctly informed that the water rights were owned by the farmers and not by the United States, it would have entered the Judgment and Order and Operating Criteria which, in fact, ordered the Secretary to limit those privately-owned water rights.

I sincerely urge you, as Secretary, to have your attorneys bring an appropriate motion before the court in the Case of *Pyramid Lake Paiute Tribe of Indians v. Morton,* Civil Action No. 2566-70, United States District Court for the District of Columbia to, in essence, inform that court that because of the December 18, 1980 Final Decree in the *Alpine* case it is just impossible to implement and enforce the Operating Criteria that the court ordered the Secretary to implement and enforce in its February 20, 1973 Judgment and Order and request that you, as Secretary of the Interior, be relieved of that responsibility. Reference to that court's caveat that was inserted in that Judg-

ment and Order (which is quoted above at page 5) could be noted, pointing out that the Nevada District Court has now resolved the former ambiguities between its September 8, 1944 Final Decree in the *Orr Ditch* case and its March 24, 1950 temporary restraining order in the *Alpine* case, that the ownership of the water rights involved has now been decided by the Nevada District Court, and that the central provisions of the 1973 court-imposed Operating Criteria have been effectively abrogated by the December 18, 1980 Nevada District Court Final Decree and Court Opinion in the *Alpine* case.

It is the District's position that it makes no sense at all for the Secretary of the Interior now to publish and attempt to implement and enforce the old court-imposed Operating Criteria for the water year ending October 31, 1981, or for future water years. These old Operating Criteria are clearly in conflict with existing decrees, and no court would enforce the basic provision of those old Operating Criteria, that is, the 288,129 acre-feet limitation on the District's irrigation releases from the Truckee Canal and Lahontan Reservoir.

I would also note that the Operating Criteria adopted by the District of Columbia Court in 1973 provide for the storage in Stampede Reservoir of up to 50,000 acre-feet annually of Newlands Project water. Under the Operating Criteria this water would be released to the District if needed. The District's hydrologist has advised us that this provision conflicts with the use of Stampede Reservoir for the maintenance of fish flows in the lower Truckee River and as a source of domestic water for the Reno area, particularly in water short years, which as we understand it is the current envisioned use of Stampede Reservoir by the Department of Water and Power Resources.

Frankly, the District believes that no Operating Criteria are required or necessary. We now have federal

court decrees on both the Truckee and Carson Rivers, and the United States District Court Judge has appointed a single watermaster to regulate the exercise of the decreed rights and enforce the provisions of those decrees. If any party (which includes the United States, the Tribe and Truckee-Carson Irrigation District) feels that any other party is using more water than he is entitled to use, the matter can be brought to the immediate attention of the watermaster for determination and if one is not satisfied with the watermaster's decision one has the right to then have the court decide the matter.

There is no need at all for any Operating Criteria (which are, in essence, just rules and regulations) concerned with the use of the Newlands Reclamation Project farmers' privately-owned water rights. Any dispute as to such use is going to have to be resolved by the Nevada District Court or its watermaster in any event. Why adopt Operating Criteria or rules and regulations which just cloud the issue and which in fact accomplish nothing but litigation?

However, if you do conclude that new operating criteria for the water year ending October 31, 1981, and for subsequent water years are to be adopted and then published in the Federal Register, Truckee-Carson Irrigation District would at least desire to have its views as to specific criteria considered in a *meaningful* way *before* they are adopted. We would suggest a joint effort between Water & Power Resources and the District to develop such citeria if it is determined that a need for such criteria exists.

During the last several years the District has been effectively excluded from participating in the Department of the Interior decisions that are concerned with the Newlands Project. As an example only, I refer to those meetings during early 1978 which decided that 40,000 acre-feet of Reno-Sparks sewage effluent should be piped to Dodge Flat and used to irrigate 10,000 new acres on the Pyramid Lake Indian Reserva-

tion, and that as a consequence 10,000 acres of water right land on the Newlands Project would be retired and no longer irrigated. These decisions were, in fact, reached in meetings between Department of the Interior personnel and counsel for the Pyramid Lake Paiute Tribe of Indians which the District's representatives were not privileged to attend.

Frankly, there are a number of outstanding matters that involve the District and the Department of the Interior that should be openly discussed with you or your designee, and hopefully resolved.

1. The purported termination of the District's December 18, 1926 contract and the threatened takeover of the project's operation by the Water & Power Resources Service is one matter that should be discussed at this time regardless of the final outcome of the case of *Truckee-Carson Irrigation District v. Secretary of the Interior,* Civil No. R-74-34-BRT, United States District Court for the District of Nevada. The District's refusal to confine its diversions to the amounts specified in the court-imposed Operating Criteria occasioned the purported termination of the District's December 18, 1926 contract and the consequent threat of federal takeover. *The District's position has now been vindicated by the December 18, 1980 Final Decree in the Alpine case.* The only purpose of the federal takeover was to force compliance with the court-imposed Operating Criteria. Those could not now be enforced even if the District's December 18, 1926 contract were terminated and the Water & Power Resources Service were to take over and operate the project. In sum, the events that have occurred since September 14, 1973 when the Secretary's notice of termination of the District's December 18, 1926 contract was given, not only justify but compel the reexamination of that decision. It just makes no sense today. Nothing beneficial could be accomplished by substituting federal control for local control. In fact, detriments would follow from a federal takeover, for

if the Water & Power Resources Service were to operate the project its own studies show that the costs of operation and maintenance would at least double with no corresponding benefits to the project farmers or anyone else.[4]

2. More than four years ago the Department of the Interior inspected Lahontan Dam and concluded that certain spillway repairs would be necessary to insure its safety for the inflow design flood. Until the repairs could be performed, interim storage criteria were imposed which limit the amount of water which can be stored in Lahontan Reservoir between November 1 and March 1 to 215,000 acre-feet. It is the District's understanding that the funds to accomplish the required repairs have been appropriated. It is the District's feeling that the work would have been under way and completed by now if dam safety had been the real concern of the Department. Yet the spillway repair work has still not begun and the District has been unable even to find out when the work is to commence. The District is inclined to the view that the recommended work and the interim storage limitation were really imposed as a vehicle to deliver more water to Pyramid Lake rather than as a valid dam safety requirement. This view becomes increasingly compelling as time passes without indication that the spillway work will ever be accomplished.

3. The 64-acre parcel of land at Lake Tahoe in California is another area of disagreement that could possibly be resolved by discussion. This 64-acre parcel was purchased by the United States in 1904 for an outlet facility at Lake Tahoe. The project water users have now repaid the United States all or virtually all

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[4]See Bureau of Reclamation's report entitled "Proposed Alteration of an Existing Structure, Modification of Lahontan Dam, July 1976," where the project's operation and maintenance costs under operation by the United States and the District were compared.

of that purchase price. The 64-acre parcel was transferred to the District pursuant to the terms of the District's December 18, 1926 contract with the United States. While the need for the outlet facility at Lake Tahoe was removed by the condemnation of the existing dam at Lake Tahoe in 1915, the District has always possessed and used the 64-acre parcel and applied the revenues therefrom to offset the project's operation and maintenance costs, which it is entitled to do under its December 18, 1926 contract with the United States. Although the United States has refused to approve even annual leases on the tract, the District has been able to realize some $20,000 annually through tenancies at will. By the Bureau's own evaluation in 1965, annual revenues on the property with a then-estimated market value of $1,200,000 should have been $60,000 and no doubt would have been had the District been able to provide any assurance to its tenants that long-range investments in the property could be recovered. Taking into account the increased value of land at Lake Tahoe and other factors including inflation, there is no doubt that the 1965 Bureau estimate of market value of $1,200,000 is substantially below its present market value, and that their estimate of annual revenue of 60,000 from the 64-acre tract is no where near the annual revenue that could be obtained if the District were permitted to use or lease it under current market conditions.

The United States contends that the Secretary was entitled unilaterally to revoke the District's custody of this 64-acre parcel of land and that it is now entitled to recover possession of the 64-acre parcel for "public use."

The issue as to who is now entitled to the possession and use of the 64-acre tract and the propriety of the Secretary's unilateral revocation of the District's custody over the 64-acre parcel is presently being litigated in the case of *United States of America v. Truckee-Carson Irrigation District,* Civil No. S-78-611 MLS, United States District Court for the Eastern District

of California. Judge Milton L. Schwartz' Memorandum and Order, filed March 18, 1981, provided that while the Secretary can repossess the tract, he must first comply with the National Environmental Policy Act ("NEPA") of 1969, and that the District was entitled to continue its possession of the 64-acre tract of land at least until the requisite trial concerned with the NEPA issues had been concluded. Following that trial (which will probably not take place for a year or two at least) the District (and for that matter, the United States) will have to make a decision as to what action, if any, it desires to take. The District believes that it will prevail on the NEPA issues and that the United States will not be permitted to obtain possession of the 64-acre tract. The United States undoubtedly is of a contrary view. Obviously, allowing the government to repossess the tract at today's values and without compensation being paid to or on behalf of the water users on the project is distasteful, to say the least, to the District, and if that were the result of the district court proceeding the District would in all probability appeal.

It seems to me that some serious discussions with you or your designee directed toward an immediate and mutually satisfactory resolution of the problem of the 64-acre parcel at Lake Tahoe should at least be explored.

4. After many meetings, much correspondence and the drafting of several proposed agreements, the "Nine Point" program was agreed to by the then Secretary of the Interior and incorporated into two contracts which, after approval by vote of the water users of the Newlands Project in 1968, were signed by officers of the District and delivered to the Commissioner of Reclamation for submission to Congress. No bill for authorization by Congress was ever introduced.

Briefly, the "Nine Point" program included, among other provisions, the modification of the 1926 contract to limit Newlands Project water deliveries to 406,000

acre-feet annually, the freezing of project water rights at the present level, the withdrawal from the custody of the District the 64-acre tract of land at Lake Tahoe and the elimination of the use of water for single purpose power generation. In consideration of these conditions, the United States agreed to rehabilitate on a non-reimbursable basis certain project facilities at an estimated cost of $2,000,000 and to pursue a rehabilitation of the project's distribution and drainage systems on a 50% reimbursable basis at an estimated cost of $1,500,000.

In reliance on the promises of federal personnel, including Mr. Bob Charles Luce, the then Assistant Secretary of the Interior, that the "Nine Point" program would be carried out, the District discontinued its use of water for "single-purpose" power generation which was one of the conditions of the agreements. The Truckee River water which would have been diverted and used for the production of power except for the facts and circumstances briefly discussed above, was permitted to run past Derby Dam and into Pyramid Lake for the use and benefit of the United States, as trustee for the Pyramid Lake Paiute Tribe of Indians. After many inquiries by the District, a letter dated July 25, 1975, from the United States notified the District that the "Nine Point" program was no longer viable, the stated reason being that the Secretary of the Interior had notified the District of the cancellation of its December 18, 1926 contract. The District filed a Petition in the United States Court of Claims on November 24, 1978, for damages and compensation for its power revenue losses that resulted from the breach of the agreement and implied contract between the District and the United States. As I understand it the government's motion for summary judgment was denied and the case is now awaiting a trial date. Obviously, any settlement of the litigation should also address and hopefully resolve this Court of Claims proceeding.

In conclusion, representatives of Truckee-Carson Irrigation District would be happy to meet with you or your designee at any time and respectfully suggest the month of June to further explain and hopefully resolve at least some of the matters outlined above. The District sincerely desires to work with the Department of the Interior. While we will not always agree, the extreme adversary relationship that has been evident in the past has not benefited Truckee-Carson Irrigation District or the farmers or, in my view at least, the United States. I think all of us can do better.

Sincerely yours,

TRUCKEE-CARSON IRRIGATION DISTRICT
/s/ Joe Serpa, Jr.,

Joe Serpa, Jr., President
Board of Directors

JS:kh

cc: Honorable Howard W. Cannon
U. S. Senator of Nevada
Senate Office Building,
Room 259
Washington, D.C. 20510

Honorable Paul Laxalt
U. S. Senator of Nevada
Room 326
Russell Building
Washington, D.C. 20510

Honorable James Santini
Congressman from Nevada
1408 Longworth Building
Washington, D.C. 20515

APPENDIX E

UNITED STATES SENATE
Washington, D.C. 20510

Committee On Appropriations
Committee On Judiciary

Dear Bill:

It has come to my attention that the Department of Justice has sought an extension of time to file an appeal in the case of *United States v. Alpine Land & Reservoir Company,* Equity Docket No. D-183, United States District Court for the District of Nevada. As a result, I recently wrote to Carol Dinkins to respectfully urge that no appeal be filed in this case. This letter is simply to make you aware of my concerns and to provide some background.

A final decree in *Alpine* was entered on December 18, 1980 after more than fifty-four years of litigation to determine the rights to the use of the waters in the Carson River and its tributaries in Nevada. During this extended litigation all parties were adequately represented and all issues dealt with. Apparently, the only parties not completely satisfied are a small number of Indians and some attorneys within the Department of Justice.

At the present time, sensitive negotiations are being established by the Department of Interior with hopes of solving the many complex water problems in northern Nevada that have been the source of litigation for decades. The chances of reaching a settlement of these issues, or even proceeding with viable negotiations, will be greatly diminished if an appeal is filed in this case. It is my understanding that the Department of Interior concurs in my feeling that the *Alpine* case should not be appealed.

Bill, my reading of this situation leaves me with the impression that this is a classic case of a group of lawyers wanting to appeal a suit simply for the sake

of appealing and, perhaps, proving some obtuse legal point. I have every hope that such will not be the case in the *Alpine* litigation. If you could check into this it would be greatly appreciated.

I appreciate your consideration and hope that I have been able to provide you with some useful background.

Sincerely,

/s/ Paul Laxalt
U. S. Senator

PL:fba

Honorable William French Smith
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

APPENDIX F

The UNITED STATES of America,
Plaintiff,

vs.

ALPINE LAND & RESERVOIR COMPANY,
a corporation et al.,
Defendants.

Civ. No. D-183 BRT.

United States District Court,
D. Nevada.

Oct. 28, 1980.

OPINION

BRUCE R. THOMPSON, District Judge

This is a quiet title suit to adjudicate the rights to the use of the water of Carson River in Nevada and Cali-

fornia. The case was tried before the Court and John V. Mueller, a Special Master, the Master having heretofore submitted proposed findings of fact, conclusions of law and decree. Objections to the Master's report have been filed by the parties and further trial proceedings to resolve those objections have been held before the Court as provided by the proposed preliminary pretrial order heretofore filed and approved by the Court on October 20, 1977.

This Court has jurisdiction over this matter under 28 U. S. C. § 1345 and the Act of September 19, 1922, 42 Stat. 849. The question of the jurisdiction of the Court over successors in interest to the original defendants, including those in California, was briefed. On February 15, 1974, the Court concluded in open court:

> that the Court does continue to have jurisdiction over the successors in interest of all parties who were originally parties to this litigation.

As provided in the proposed preliminary pre-trial order, the proposed Mueller findings of fact, conclusions of law and decree, submitted in June 1951 and later amended, shall, except where modified and supplemented in resolving the issues hereinafter set out, constitute the final findings of fact, conclusions of law and decree in this case.

The following is the Court's opinion regarding various issues of law and fact and mixed law and fact covered by the evidence received and the extensive briefs of the

parties. If certain contentions made or issues stated in the pre-trial orders are not discussed, they are considered irrelevant.

THE WATER RIGHTS FROM THE UNITED STATES' APPROPRIATION FOR THE NEWLANDS PROJECT.

The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's interest to secure repayment of the project construction costs.

Section 8 of the Reclamation Act of 1902, 43 U. S. C. § 372, states:

> "The right to the use of water acquired under the provisions of this Act [5 § 485, §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 439, 461, 491, 498 of this title] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

43 U. S. C. § 542 states:

> "Every patent and water-right certificate issued under this Act [§§ 541-546 of this title] shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights *appurtenant* or belonging thereto . . ." (Emphasis added.)

Furthermore, 43 U. S. C. § 498 empowers the Secretary of the Interior to transfer the operation and management of irrigation works to project landowners once payments for a major portion of the project lands are made. Section 498 specifically states that despite any transfer of operation and management responsibilities, title to the reservoirs and works remains in the government. The lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents. The Supreme Court discussed the Reclamation Act in conjunction with the western doctrine of appropriative water rights in *Ickes v. Fox,* 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937). The court emphatically stated that although the government diverted, stored and distributed the water, the ownership of the water or water rights did not vest in the United States. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners. . . ." Id. at 95, 57 S. Ct. at 416. Thus any property right of the government in the irrigation works is separate and distinct from the property right of the land owners in the water right itself. In *California v. United States,* 438 U. S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978), the court concluded, after an extensive survey of the older cases and the legislative history of the Reclamation Act, that state law was supposed to control the Act in two major ways:

> "First . . . the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law.
>
> * * *

> "Second, once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law."

Id. at 665-7, 98 S. Ct. at 2996. In all the arid states, including Nevada, it is settled state law that the right to use water is acquired by an appropriation to some beneficial use. In *Fox* the court held that this type of right is a property right, which, "when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied." 300 U. S. at 95-6, 57 S. Ct. at 416-17.

In *Nebraska v. Wyoming,* 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945), the court reiterated the *Fox* analysis, once more defeating the government's claim to project water rights. More recently, in the *California* case, the court pointed out that an important unifying factor in the long working relationship between the United States and the several arid western states in the area of reclamation projects is the "purposeful and continued deference to state water law by Congress." *California v. United States,* id. at 653, 98 S. Ct. at 2989. The only area where state law may not control is where it conflicts with explicit congressional directives in the Reclamation Act, a concern not relevant to this case. It cannot be disputed that under Nevada's appropriative water right statutes the water appropriated and beneficially used on the land is appurtenant to that land and those water rights are owned by the land owner.

The United States relies upon *Ide v. United States,* 263 U. S. 497, 44 S. Ct. 182, 68 L. Ed. 407 (1924), and *United States v. Humboldt Lovelock Irrigation Light & Power Co.,* 97 F. 2d 38 (9th Cir. 1938), as supporting its

claim to title to the project water rights. These cases reveal little, if any, support for the government's position. The plaintiff land owners in *Ide* had acquired parcels of a former school site owned by the state of Wyoming but located in the midst of a federal reclamation project. These land owners got patents from Wyoming with no water rights; the surrounding lands were sold to farmers by the federal government with a project water right. The plaintiff land owners, all of whom got patents from Wyoming, attempted to assert appropriation of seepage water from the irrigation of the surrounding project lands.

In discussing the general nature of the entire project, the court clearly stated that a water right vests in the holder of a project land patent from the federal government. "The lands are disposed of in small tracts . . . each disposal carrying with it a perpetual right to water from project canals." *Ide v. United States* at 499, 44 S. Ct. at 182. The court held that there could be no appropriation of the seepage water because, although the federal government passed water rights with the project land patents, it did not give up all incidents of control, and so could collect and redistribute seepage water as against the land owners with Wyoming patents and no original project water rights. This holding is merely a slightly different way of stating what was said in *Fox*, that the government diverts, stores and distributes water but the project farmers with government patents, not the government itself, have title to the water right.

In *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, the question was whether a motion to dismiss for failure to state facts sufficient to constitute a cause of suit was proper where the United States sought

an injunction against a private reservoir company to prevent diversions of water allegedly in violation of earlier priorities owned by the government. The government owned no land; the defendant maintained that the government could own no water rights without owning land, and thus that the government did not state facts establishing a property right. The water rights in question had originally been appurtenant to private irrigated lands and had been conveyed to the United States by the private owners. The appellate court held that the relevant Nevada statute "authorizes conveyance to, and ownership by, appellant (United States) of the water rights in question, regardless of whether it does or does not own land to be irrigated." *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, at 45. The appellate court also quoted with approval from *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 P. 720, 144 P. 744 to the effect: "a water right for agricultural purposes, to be available and effective, must be attached to the land and become in a sense appurtenant thereto by actual application." (at p. 43). The essence of the decision in the case is that the United States had sufficient interest in the water rights to have standing to maintain the suit.

This case is thus of little relevance to the present problem since it is not disputed here that water rights can be conveyed to the United States or that the United States can own water rights. Rather, the issue here is what happened to the water rights after they were properly acquired by the United States. The United States passed title to the water rights to the project, farmers and the rights are appurtenant to the land irrigated.

IS THE CARSON RIVER THE PRIMARY SOURCE OF WATER FOR THE CARSON DIVISION OF THE NEWLANDS PROJECT?

The parties have in the pre-trial order stated the foregoing as an issue. It is not easily understood why an answer is needed. Lake Lahontan is serviced by the Carson River and by diversions from the Truckee River through the Truckee Canal. Obviously, all Carson River water which reaches the Lahontan Reservoir is captured and stored there. Under section 8 of the Reclamation Act of 1902 (43 U. S. C. § 372), the Nevada statute (N. R. S. 533.035), and all applicable judicial precedent, beneficial use is the basis, the measure and the limit of a water right. Hence, additional water diverted through the Truckee Canal is limited to the amount required for beneficial use. While Claim No. 3 on page 10 of the Truckee River Final Decree grants to the United States the right to divert 1,500 cubic feet per second of water flowing in the Truckee River for use on the Newlands Project, the Truckee River Decree itself, on page 87, expresses the beneficial use limitation as follows: "Except as herein specially provided no diversion of water into any ditch or canal in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree."

THE VESTED RIGHTS ACQUIRED BY PURCHASE BY THE UNITED STATES.

In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates ranging from 1865

to 1902. These rights were conveyed to the United States by private land owners in exchange for the government's promise to deliver Project water to these farms.

The defendant upstream users make three separate arguments in regard to these rights. First, the defendants contend that it is physically impossible to bring water down the river during low flow periods to satisfy these earlier priorities in derogation of later priorities upstream from the Project; water decrees must be practical and there is no point in adjudicating a right which cannot physically be satisfied. Second, the defendants argue that since the United States has never actually asserted or used these rights with an identity separate from the rest of the Project water,[1] the separate title to these rights has been abandoned or forfeited. Third, the defendants assert that, since the United States failed to make applications to change the place of diversion and place of use pursuant to state law, the claimed rights have been forfeited.

A. *Impossibility.*

The upstream defendants assert that these rights should not be adjudicated since it is physically impossible to assert the claimed earlier priorities in derogation of junior priorities located upstream. Regardless of the validity of this argument, the defendants ignore the possibility that the United States may assert these rights against others in the Newlands Project. For example, if

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[1]All the waters of the Carson are diverted at the same place by the Lahontan Dam and thus are commingled for storage and distribution.

the TCID wanted to drain the reservoir entirely in order to satisfy the farmers' 1902 irrigation priority, the United States could prevent that drainage to the extent of its assigned priorities dated before 1902. Thus the rights in question are not merely illusory or paper rights; the adjudication of these rights can have an impact on the parties and the course of events on the river.

B. *Failure to Assert the Rights Separtely.*

The defendants' argument that the United States has failed to assert the vested rights with a separate identity is equivalent to the argument that the United States has failed to beneficially use the water. *United States v. Humboldt Lovelock Irrigation Light & Power Co.* holds that the United States may own a water right regardless of whether or not it owns irrigable land. In *Humboldt,* however, the question was not whether the United States had failed to beneficially apply water under a water right; rather, the question was whether the United States had stated a property right sufficient to sustain a cause of action where private parties had transferred water rights to the United States and the United States owned no irrigable land. This distinction is crucial to the present problem. It is not disputed that the United States may validly acquire a water right. The questions here are: assuming the rights to be properly acquired, has the United States used these rights beneficially, and, if not, then what are the consequences?

The United States owns lands within the Newlands Project. Referred to in this case generally as the Carson Pasture area and the Stillwater area, these lands comprise some 17,000 to 20,000 acres. Testimony indicated that

these areas receive water largely from drainage or seepage from Project farms and very occasionally from direct flows. The amount of land actually irrigated varies greatly from year to year depending on the available water. The United States specifically denies that it claims or holds any direct water right for the federally owned land in the Project.

An issue is stated on page 6 of the approved pretrial order as follows:

> "9. Do the Carson Pasture and other custodial lands have a water right and, if so, what is their priority?
>
> "The parties agree that the Carson Pasture and other pasture lands within the project have an irrigation water right with a priority of July 2, 1902."

The foregoing is not a stipulation that the pasture lands are entitled to direct diversion from the Carson River of water for the irrigation of the pasture lands with a specific acre foot per acre duty. It is a recognition of an historic condition, that is, that the pasture lands are entitled to the use of whatever waters flow from the lower portion of the Project vested right lands to the exclusion of anyone who might seek to appropriate the waters for other uses.

The United States asserts that the federally owned lands are entitled only to receive whatever quantity of drainage water flows off the bottom of the Project. Additionally, the United States points to the contract executed in 1926 between the Truckee-Carson Irrigation District and the United States wherein the United States turned over operation and management of the Project to the District. Paragraph 35 of this contract prohibits the

delivery of water "to lands other than vested right land. . . ." The United States, then, not only does not claim a water right for these lands but strongly argues *against* any entitlement to direct flows. Under these circumstances, the United States has never used its purchased and appropriated rights beneficially on the federally owned land in the Project and has represented to this Court that it does not claim *any* vested right as to that land.

The failure to beneficially use the water for irrigation purposes does not end the problem, however. There are other beneficial uses to which water can be applied; among these other uses are fishing and public recreation. *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N. M. 207, 182 P. 2d 421 (1945); *Surface Creek Ditch & Reservoir Co. v. Grand Mesa Resort Co.*, 114 Colo. 543, 168 P. 2d 906 (Colo. S. Ct. en banc, 1946); *State, Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 530 P. 2d 924 (1974); *Brasher v. Gibson*, 2 Ariz. App. 91, 406 P. 2d 441, vacated on other grds., 101 Ariz. 326, 419 P. 2d 505 (1966); Clark "Waters and Water Rights" 1967 Ed. Vol. 1, p. 375. The Nevada legislature has expressly declared "any recreational purpose" to be a beneficial use of water. N. R. S. 533.030, 1969 St. 141. A similar statute was interpreted by the Arizona Court of Appeals in *McClellan v. Jantzen*, 26 Ariz. App. 223, 547 P. 2d 494 (1976), which commented as follows:

> "Originally, the concept of 'appropriation of waters' consisted of the diversion of that water with the intent to appropriate it and put it to a beneficial use. *Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931). Being the first to have properly performed these functions, the appropriator acquired a vested right to the use of these waters as

> against the world which could not be taken from him except by his consent. *Gila Water Co. v. Green,* 27 Ariz. 318, 232 P. 1016 (1925), modified in 29 Ariz. 304, 241 P. 307 (1925); *Adams v. Salt River Valley Water Users Ass'n.,* 53 Ariz. 374, 89 P. 2d 1060 (1939). The concept of diversion to effect the beneficial use was consistent with the stated purposes for which an appropriation could be made prior to 1941, that is, domestic, municipal, irrigation, stock watering, water power and mining. However, in 1941 when 'wildlife, including fish' and in 1962 when 'recreation' were added to the purposes for appropriation, the concept of ***in situ*** appropriation of water was introduced—it appearing to us that these purposes could be enjoyed without a diversion. We find nothing, however, which would indicate that the legislature intended that such an *in situ* appropriation would not carry with it the exclusive vested rights to use the waters for these purposes. We therefore find that by these amendments the legislature intended to grant a vested right to the State of Arizona to subject unappropriated waters exclusively to the use of recreation and fishing. Conceivably then, and assuming a first in right appropriation, the Game & Fish Department could prohibit the draining of a lake for irrigation purposes for example, if that draining interfered with the fish therein. This obtaining of a vested right to use the water for fish is to be contrasted with the statutory authority vested in the Department by A. R. S. § 17-231 (B)(6) allowing it to stock fish in public and private waters."

Inasmuch as the concept of *in situ* appropriation of water to a beneficial use had been recognized by the Nevada Supreme Court long prior to the 1969 statutory amendment (*Steptoe Live Stock Co. v. Gulley,* 53 Nev. 163, 295 P. 772 (1931)) we have no difficulty in recognizing recreation and fishing as beneficial uses of water.

The Court takes judicial notice of the fact that fishing and public recreation have taken place on Lahontan Res-

ervoir virtually since the construction of the dam. Thus the water has been beneficially used and the United States has not abandoned or forfeited these rights.

C. *Failure to Make Change Applications.*

In general, the United States is required to conform to applicable state water law in carrying out the Reclamation Act. Section 8 of the Reclamation Act of 1902, 43 U. S. C. § 383 provides in pertinent part:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ."

As previously discussed, in construing the Reclamation Act the Supreme Court has held that state law was meant to control the Act unless in conflict with explicit congressional directives in the Act. *California v. United States, supra. See also, United States v. Gerlach Live Stock Co.,* 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950); *Nebraska v. Wyoming, supra; California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142, 164 n. 2, 55 S. Ct. 725, 731 n. 2, 79 L. Ed. 1356 (1935); *United States v. District Court of Fourth Judicial District in and for Utah County,* 121 Utah 1, 238 P. 2d 1132 (1951).

A careful examination of the Reclamation Act reveals no explicit congressional directives relating to the transfer of vested water rights to the United States. In fact, the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water

law, impels the conclusion that Congress intended transfers to be subject to state water law. Thus, the United States was and is required to conform to applicable Nevada law with respect to changing the place of diversion or place of use.

The defendants assert that in failing to make change applications the United States has forfeited the claimed rights. An examination of the contracts reveals widely varying dates of agreement. Of the eighty contracts totaling 29,884 acres of water rights, there are eleven contracts covering a total of 9,045 acres that are dated after 1913 and sixty-nine contracts covering a total of 20,839 acres of water rights dated before 1913. It was in 1913 that Nevada's appropriative surface water right scheme (now Chapter 533 N. R. S.) was enacted.

As far as the pre-1913 contracts are concerned, they are governed by the Nevada case law existing before the enactment of the statutory scheme. *See* N. R. S. 533.085 [84:140:1913; 1919 RL p. 3247; N. C. L. § 7970]; *Humboldt Land & Cattle Co. v. Allen,* 14 F. 2d 650, 653 (9th Cir. 1926). This Court can find no requirement in the pre-1913 common law for notices of, or applications for, changes in the place of diversion or place of use for water rights vested and transferred prior to 1913. Indeed, *Union Mill & Mining Co. v. Dangberg,* 81 F. 73 (C. C. D. Nev. 1897), directly holds that the place of diversion or place of use may be changed at any time as long as other rights are not injured. Therefore there could be no penalty as to those rights for failure to make the change applications.

As to the post-1913 contracts, even were the Court to agree with the requirement that the government make change applications, a failure to do so would only incur

a loss of priority date, not a complete forfeiture of the right. *See* N. R. S. 533.040 [4:140:1913; 1919 RL p. 3225; N. C. L. § 7893] and 533.325 [59:140:1913; A 1919, 71; 1951, 132]. However, the Court does not agree that the government was even required to make change applications. The entire plan for the Project was formulated around 1902 and many of the contract rights were acquired in 1906 and 1907. The United States is entitled to carry out and complete the Project under the Nevada law as it existed when the Project plan was formulated and activity commenced. Thus the intervening enactment of Nevada's statutory water code should not be used to destroy the priorities of rights acquired by the United States pursuant to completion of the original plan.

The comments in the Congressional Record during the passage of the Reclamation Act, cited in *California v. United States, supra,* 438 U. S. at pp. 665, 666 and 668, 98 S. Ct. at pp. 2996, 2997, indicate that a major factor in the Secretary's decision on the feasibility of a reclamation project was to be the status of relevant state water law. It would be unfair to allow the government to make decisions based on the applicable state law at the time the project was authorized and commence action on an enormously expensive project and then allow the state to change the rules for the government in midstream. For the Newlands Project the applicable Nevada law was the state water law as it existed in 1902. Of course now that the Project has been completed for many years, the government is subject to all the strictures of the state law as discussed in *California v. United States, supra.* The defendants' argument that the failure to make change applications has an effect on the government's water rights is meritless.

THE WATER DUTIES FOR THE WATER RIGHTS ON THE NEWLANDS PROJECT AND BELOW LAHONTAN.

This section deals with the duty for the privately owned Project farmlands, and the duty for the United States's right for fishing and recreation on the Lahontan Reservoir.

A. *Water Duties for the Project Farmlands.*

The arguments as to these duties can be separated into legal contentions and evidentiary or factual contentions. The legal contentions concern alleged limitations on the farmland duties resulting from contractual agreements and from Nevada's State Cooperative Act of 1903. The factual contentions concern what is the proper amount of water reasonably necessary to grow alfalfa on the Project farms.

(1) *Legal Arguments.* Section 2 of the State Cooperative Act of 1903 limited:

> "the quantity of water which may be appropriated or used for irrigation purposes in the State of Nevada [to] . . . three acre feet per year for each acre of land supplied." (1903 Nev.Stats. Chap. IV, § 2)

This very section of the Act was singled out for repeal two years later in 1905. *See* 1905 Nev.Stats. Chap. XLVI, § 1. Nonetheless, the United States argues that this section limits all rights obtained on the Newlands Project to three acre feet per acre.

The United States, as well as the other parties, stipulated before trial that the priority date for the Newlands irrigation rights is July 2, 1902. It is difficult to see how the 1903 Cooperative Act could constitutionally limit or

impair rights in existence prior to 1903. The United States, however, argues that the July 2, 1902 priority date is arrived at by the doctrine of relation back and the Secretary did not actually claim the water right until May 26, 1903; the rights are therefore said *not* to have been in existence before the enactment of the 1903 Act.

This theory fails because the United States seriously misapprehends the doctrine of relation back. This doctrine does not pick the date of priority out of thin air; the date of priority is the date that work commenced on an appropriation. The nature of a water right is such that it takes time to perfect the right. It may, in fact, take years of diligent work to build dams, ditches and canals, clear and prepare fields and finally use the water to grow crops on those fields.

The doctrine of relation back tells an appropriator that if the work of appropriation is pursued diligently, the date of priority will be the date work was commenced, not the date of application or the date of perfection. The Nevada Supreme Court has stated:

> "[w]hen any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it."

Ophir Mining Co. v. Carpenter, 4 Nev. 534 at 543-44 (1869). *See also Farmers' High Line Canal & Reservoir Co. v. Southworth,* 13 Colo. 111, 21 P. 1028 at 1029 (1889); *Nevada Ditch Co. v. Bennett,* 30 Or. 59, 45 P. 472 at 480 (1896).

In stipulating to the 1902 priority, the parties have agreed that the first steps were taken to secure these rights in 1902. The date that the Secretary formally claimed the rights is irrelevant. Upon the diligent perfection of these rights, the law recognizes that the rights have been in existence since 1902 and the 1903 Cooperative Act cannot limit the rights to three acre feet per acre.

Furthermore, the repeal of the limiting section of the Act is significant. In the absence of legislative history, it would at least be arguable that the repeal of Section 2 of the 1903 Act and the subsequent enactment of what is now N.R.S. 533.035 (beneficial use shall be the basis, the measure and the limit of the right to the use of water) represents a legislative judgment that a specific limitation was ill-advised under the varying conditions of climate and soil in Nevada.

The United States makes the additional legal argument that certain of the Project farmlands are limited by contract to a water right of three acre-feet per acre. A number of representative contracts were put into evidence as Exhibit 38. These are all contracts between the United States and private landholders for the delivery of water from the Reclamation Project. Some of the contracts contain no specific acre foot limitation, but rather refer to "an amount necessary for the proper irrigation" of X acres, or the "quantity of water which shall be beneficially used for the irrigation" of the lands in question. These contracts are not at issue.

Those at issue are the contracts covering some 42,447 acres in which a specific acre foot limitation is expressed.

Representative of these contracts are the contract between Oswald J. Leet and the United States, and that between Julius M. Christensen and the United States. Mr. Leet's contract states:

> "II. That the party of the second part hereby agrees to deliver without charge except as hereinafter provided and free of all cost or charge for building the irrigation works, water not exceeding three (3) acre-feet per acre for the proper irrigation of seventy-six (76) acres of land . . . ."

Mr. Christensen's contract states:

> "2. The quantitive measure of the water right hereby applied for is that quantity of water which shall be beneficially used for the irrigation of said irrigable lands up to, but not exceeding three acre-feet per acre per annum, measured at the land; and in no case exceeding the share, proportionate to irrigable acreage, of the water supply actually available as determined by the Project Engineer or other proper officers of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit."

The United States maintains that these types of contracts limit those 42,447 acres to a maximum duty of three acre-feet per acre. The defendants argue that reasonable beneficial use is the measure and limit of their rights regardless of the contract language.

A similar problem arose in the state of Washington in connection with the Sunnyside Division of the Yakima Project. There, the farmers had various contracts with the government some of which expressed a three acre-foot limitation. The contract language provided:

> "The quantity of water to be furnished hereunder shall be 3 acre feet per acre of water per annum

> per acre of irrigable land, . . . measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; Provided, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land . . ."

Lawrence v. Southard, 192 Wash. 287, 73 P. 2d 722, 723 (1937). The Secretary of the Interior attempted to limit the Sunnyside farmers to 3 acre-feet under all the contracts except that the farmers could rent more water for an additional charge beyond the original payment for the Project's construction costs. The conflict over the Secretary's attempted action resulted in years of lawsuits. The cases of *Lawrence v. Southard, Ickes v. Fox,* 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937), and *Fox v. Ickes,* 137 F. 2d 30 (1943) all deal with the question of whether the Secretary could limit the water supplied under the contracts to 3 acre-feet per acre and charge an additional fee for water above that amount.

In *Ickes v. Fox,* the Supreme Court engaged in a lengthy explication of the Reclamation Act in holding that the United States was not an indispensable party to an action against the Secretary of the Interior to set aside his orders limiting farmers' contract water rights to 3 acre-feet per acre. There followed a trial on the merits of the claims which was appealed in *Fox v. Ickes.* The District of Columbia Court of Appeals held that: "[r]eading the Reclamation Act in the light of the decision in *Ickes v. Fox,* we find the situation in this case to be as follows: The water rights of appellants are not determined by contract but by beneficial use." *Fox v. Ickes,* 137 F. 2d at 33; and that "the water rights here

are not based upon the construction or enforcement of contracts with the government." *Id.* at 35.

Similarly, the Supreme Court of Washington held that beneficial use determined the water right and that the "order of the Secretary of the Interior under date of October 17, 1930 limiting the water right to 3 acre-feet is a nullity. That order was not authorized by Congress." *Lawrence v. Southard,* 192 Wash. 287, 73 P. 2d 722 at 728. Although these cases also involved issues as to prescriptive rights and the validity of appropriations, the holdings as to the contractual limitations stand on their own.

The United States argues that the contract language in our case is so different that the above authorities do not apply. This argument is meritless. Although the exact wording of the contracts in our case is not the same as in the Yakima Project contracts, the attempt to limit the water right to 3 acre-feet is exactly the same. The discussion in *Fox v. Ickes* is not so much a close examination of the contract language as it is a broad statement that the limit of water rights is beneficial use, not specific contractual limitations.

This Court finds the reasoning in *Fox* and *Lawrence* persuasive. Even more explicitly, it appears that the Secretary not only acted without authority from Congress in inserting a specific acre-foot limitation in the contracts, but acted in clear contravention of Congressional intent. Section 8 of the Reclamation Act, 43 U. S. C. § 372, states that as to water rights acquired under the Act, "beneficial use shall be the basis, the measure, and the limit of the right." Congress's intent could neither be more clear nor more specific. The contractual limitation to 3 acre-

feet per acre could only be authorized if that amount were the amount required for beneficial use. Since this Court finds that the amount required for beneficial use exceeds 3 acre-feet, the contractual limitations thwarts the Congressional intent of the Reclamation Act and is without any legal effect on the defendants' water rights. Cf. *United States v. Joyce,* 240 F. 610 (8th Cir. 1917); *United States v. Washington,* 233 F. 2d 811 (9th Cir. 1956) (the requirements of acts of Congress must be read into and are automatically part of conveyances of land by patents which have ignored such requirements.)

2. *Evidentiary Contentions.*

(a) Water Duty. One of the central tasks in this case is to establish a clear and specific water duty for both the Newlands Project farmlands and the upper Carson farmlands. Because of the mechanism adopted by the court with regard to changes in place or manner of use of the water rights, specific findings must also be made as to the consumptive use.

Alfalfa is by far the dominant crop grown on the lands in question in this case. Because of the relatively short growing season and other weather conditions in this part of the state, alfalfa is one of the few cash crops the Carson River farmlands can support.

Relying on *Farmer's Highline Canal & Reservoir Co. v. Golden,* 129 Colo. 575, 272 P. 2d 629 (1954), the United States argues that a water duty should be based on historical production. This Court's interpretation of that decision, however, is that the Colorado court based the water duty on the *kind* or *type* of crops historically grown on the lands—not the *amount* of crops historically grown.

In other words, if the farmers have been growing sugar beets, the water duty will be the amount of water reasonably necessary to grow sugar beets, not the water needed for onions or avocados. In this case, alfalfa is the crop historically grown on the lands in question and under Nevada law and the Reclamation Act, the water duty for these lands is that amount of water reasonably necessary to grow alfalfa.

The United States presented lengthy expert testimony to the effect that a water duty of 3 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on all the Project farmlands. The defendants presented equally lengthy expert testimony to the effect that a water duty of at least 3.5 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on the bottom lands in the Project and at least 4.5 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on the bench lands in the Project.

After examination and comparison of the expert evidence, particularly with regard to conveyance efficiency, on-farm efficiency, soil slope and character, weather and consumptive use, the Court finds the defendants' expert evidence more credible. As a result, the Court finds that the water duty for farmlands on the Newlands Project is 3.5 acre-feet per acre applied to the land on the bottom lands and 4.5 acre-feet per acre applied to the land on the benchlands subject always to the limitation of beneficial use.

(b) Consumptive Use. The water duty is the amount of water required to properly irrigate the farm-

lands. This duty differs depending on physical conditions. For example, in parts of the upper valley, the ground is so steep and the soil character is such that a relatively high duty is required for proper irrigation. Differing water duties do not imply that the alfalfa *uses* different amounts of water, however. In an area such as Western Nevada a certain amount of water is needed to irrigate the land, but some lesser quantity is actually consumed by the crop growth. This section addresses the issue of how much water is actually consumed in growing a ton of alfalfa on an acre of land in the Newlands Project area.

Both plaintiff and defendants presented considerable expert testimony as to lysimeter test results, actual commercial yields, lysimeter yields, and effective rainfall. There was a great deal of conflict over the proper interpretation of the lysimeter data. The most credible evidence indicates that the lysimeter yields have to be adjusted to reflect actual field conditions when estimating actual consumptive use. Because of the factors described by the defendants' experts, the actual commercial yields tend to average some 30% below lysimeter yields. The average production on the Newlands Project farms over the ten-year period from 1969-1978 is about 5 tons per acre. The lysimeter evidence showed that 6 inches of water is required per ton; the total actual consumption figure is therefore 3.25 acre-feet per acre after the lysimeter data is adjusted for production under actual field conditions. Since this case concerns the consumption of surface water from the Carson River, effective rainfall must be deducted from the total consumption figure. The evidence showed that the effective rainfall is 0.26 acre-

feet. Therefore, the consumptive use of irrigation water is 2.99 acre-feet per acre for the Newlands Project.

B. *Water Duty for the Fishing and Recreation Rights.*

The water stored in the Lahontan Reservoir for irrigation rights also functions coincidentally to provide water for fishing and recreation. The question here is: to how much water is the United States entitled for supplying the uses of fishing and recreation?

In the irrigation of crops there is an absolute upper limit to how much water can be applied; productivity drops or the crops may even drown if over-watered. Unlike irrigation, there is no apparent practical limit to the water that can be used for fishing and recreation; the more water there is, the more room there is for fish, boats and swimmers. The only physical limitation at the reservoir would be the capacity of the site. Since, however, water is such a scarce resource in this state and there are so many competing demands on the limited supply of water, each use can be assigned only the *minimum* reasonably required for that use. The evidence in this case indicates that the minimum amount of water that must be retained in the reservoir to support the fish habitat and provide swimming and boating areas is some 20,000 to 30,000 acre-feet. Therefore this Court finds that the duty for the United States's fishing and recreation right is 30,000 acre-feet.

THE WATER DUTIES AND IRRIGATION SEASON FOR LANDS ABOVE THE LAHONTAN REGION.

The lands upriver from the Newlands Project consist largely of the Carson Valley and Alpine County farmlands

with some smaller acreages between Carson City and the Lahontan Reservoir.

A. *Irrigation Season.*

All parties agree that the Federal Water Master should determine the irrigation season.

B. *Water Duties.*

The United States asserts that in the Carson Valley portion of the river the Court should not only find water duties and consumptive use figures, but also should adopt the so-called historical depletion approach. The essence of this idea is that measurements are available from gauges on each fork of the Carson as it enters the valley and from the river gauge as it exits the valley. The government urges the Court to use the historical data and subtract outflows from inflows to obtain an average historical depletion or disappearance of water in the Carson Valley. The government suggests that the Carson Valley users not be allowed to exceed this average historical depletion level and that the Federal Water Master enforce the restriction. The United States cites *United States v. Gila Valley Irrigation District,* Globe Equity No. 59 (D. Ariz., June 29, 1935) as authority for the use of the historical depletion approach.

In *Gila Valley,* the court set a permissible irrigation season consumptive use of 120,000 acre-feet for the upper valleys and held that the consumptive use would be determined by adding the recorded inflows from gauging stations located on the San Francisco River and on the Gila River at Red Rock Box Canyon and subtracting the outflow from a gauging station on the Gila River near Calva,

Arizona. This method of measurement was adopted "as sufficiently accurate for practical purposes and as better suited for administering (the) decree than any more refined method of determinating actual consumptive use." Id. at 107.

For the very reasons the Arizona court adopted the depletion approach, this Court rejects it. The conditions in the Carson Valley indicate that the use of only two inflow measuring points would be inaccurate. Unlike the semi-arid surroundings of the Gila River Valley, the Carson Valley is bounded on the west by the Sierra Nevada mountains and on the east by the Pinenut Range. The evidence showed that both mountain ranges can contribute substantial water flows from springs, creeks and snow melt; all of this water flows directly into the valley downstream from the inflow measuring gauges and is thus unmeasured. Furthermore, this Court has the benefit of considerable expert evidence on actual consumptive use and the benefit of evidence showing how the entire system has actually operated amicably and efficiently for well over 50 years. The Court does not consider the depletion approach practical or accurate in this case.

Exclusive of pressing the depletion approach, the United States has agreed with all other parties that this Court should recognize the historical customs, practices and agreements by which water has been distributed in the upper river areas. The United States stated many times, both in its briefs and through the testimony of its expert witnesses, that the government had no interest in the daily irrigation practices of the upstream users but rather desires a reasonable quantification of the upstream rights so as to clarify the protection of its downstream

rights. The United States presented no evidence as to water duties for the upstream area but urged in the post-trial briefs that the Special Master's recommendation of 5 acre-feet per acre delivered to the farm be adopted for three segments of the upper river and 4.7 acre-feet per acre should be allowed for the remaining segment. The Master's recommendation of 5 acre-feet per acre was a limitation to be imposed only when the river is on regulation; this is not a meaningful restraint in the Court's view.

The defendants presented extensive expert evidence on the water duties for the upstream area. The evidence showed that, as in the lower river area, the water duties must be varied to take into account soil character and slope. However, even where a relatively high water duty is assigned, other water users are not injured because the water not consumed all flows either back into the river or onto the water rights lands of another appropriator. In other words, some lands need large amounts of water just to achieve adequate irrigation coverage but the extra water is not wasted. Water duties not accounting for these variable factors would force the abandonment of many presently productive acres, especially in the Alpine County and Southern Carson Valley areas.

The lands on the upper Carson River must be classified into three broad categories according to soil character and slope:

(1) Benchland or river terrace—course textured, highly permeable, excessively drained and low water holding capacity soils; deep ground water depth (4 to 20 feet); moderately sloping topography; cobbles or boulders on the surface.

(2) Alluvial fan—medium textured, moderately permeable, moderately drained and moderate water holding capacity soils; moderate ground water depth (4 to 7 feet); gently sloping topography.

(3) Bottomland or meadowland—medium to fine textured, low permeability, poorly drained and medium water holding capacity soils; shallow ground water depth (0.3 to 3 feet); level topography.

One of the difficulties presented by the evidence is that the expert who testified for the Carson Valley defendants recommended duties in terms of canal diversion requirements, whereas the expert for the Alpine County defendants recommended duties in terms of water delivered to the farm. However, this is only a superficial inconsistency since most of the users in Alpine County are very close to the river so that the farm delivery requirement and the canal diversion requirement are essentially the same. The most credible expert evidence showed, and the Court finds, that the water duties, stated in terms of the canal diversion requirement, are 4.5 acre-feet per acre for the bottomland, 6.0 acre-feet per acre for the alluvial fan, and 9.0 acre-feet per acre for the benchlands.

No map delineating the areas of these three land types has been introduced in evidence but one expert made a planimeter study of the Upper Carson and the amounts of the three different types of land in each segment of the river. The Court finds that:

Segment 1 is almost entirely riparian and is ignored for these purposes;

Segment 2 contains a 25,916 acre irrigated area with 2,595 acres of benchland, 10,366 acres of alluvial fan, and 12,958 acres of bottomland;

Segment 3 is almost entirely riparian and is ignored for these purposes;

Segments 4 and 5 contain a 12,058 acre irrigated area from the Fredericksburg ditch to the confluence of the two forks with 4,335 acres of benchlands and 5,568 acres of bottomland (comparable data is not available for the area above (south) of Fredericksburg ditch);

Segment 6 contains a 5,007 acre irrigated area with the areas on the right bank having the 6.0 acre foot duty because of the deep ground water table and the left bank areas having the 4.5 acre foot duty because of the higher ground water table;

Segment 7 contains a 6,450 acre irrigated area with 2,244 acres of benchland, 2,065 acres of alluvial fan and 2,142 acres of bottomland.

The evidence is inadequate specifically to identify the acreages falling within each of the three land types and the column in the Special Master's Report assigning an acre foot per acre duty to each claim will be eliminated from the final decree. The Water Master will exercise discretion in distributing the water to meet the demands of the various land types hereinabove noted, insofar as it is practical to do so.

C. Consumptive Use.

The most credible expert evidence showed that the net consumptive use of surface water on the upper river

irrigated lands is 2.5 acre-feet per acre. The upper river consumptive use is somewhat lower than the Lahontan region consumptive use because the upper river climate is cooler and the growing season shorter. One region slowly shades into the other in the area between the reservoir and Carson City but for practical reasons the decree treats Lahontan as the dividing line.

HISTORIC PRACTICES, CUSTOMS, AGREEMENTS AND DECREES FOLLOWED IN THE UPSTREAM AREAS.

The upstream users presented detailed testimony as to historic water distribution practices followed by the water users and by the Federal Water Master not only before but since the entry of the temporary restraining order in 1950. We have the advantage of almost thirty years of experience under that order. An example of these customs is the practice of rotating an entire head of water in a ditch among users during low flow periods rather than giving each user a small portion of the available supply.[2]

The position of the United States on the historic practices issue is succinctly stated at page 49 of the United States's Post Trial Memorandum:

> "the United States has only one concern: that the upstream users do not deplete from the stream any more water than reasonably needed to satisfy the historical requirements for the irrigated acreage in accordance with the priorities determined in this case."

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[2]For a detailed listing of the historic customs, practices, agreements and decrees see the Decree.

The United States appears to be mainly, if not solely, concerned with quantification of the rights and a consumptive use finding. The expert witnesses for the United States stated several times that the defendants could continue their historic practices as long as net depletion was not increased.[3]

The Court finds that the continuation of the historic practices would not increase net depletion. In fact, the evidence presented by the defendants showed that through years of practical experience and cooperation, the farmers have developed a reasonable and workable system of water distribution. The evidence showed that the historic practices are highly efficient, practical and enhance the maximum beneficial use of the water. This Court approves and adopts the customs, practices, agreements and decrees set forth in the Decree; the Water Master is directed to include these practices in his administration of the river.

THE IMPACT OF IRRIGATION OF WATER RIGHT LAND BY "RETURN FLOW" OR "TAIL WATER" FROM OTHER LANDS.

The evidence showed that large portions of the Alpine County and Carson Valley lands are irrigated by so-called return flows. This practice occurs because water is diverted into large ditches or canals and the water is

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[3]In the Stipulated Pre-trial Order filed January 11, 1979, the United States specifically agreed that the administration of the river in autonomous segments was an historic practice and thus the United States has implied approval of this practice as well. Nowhere did the United States attack the segmentation practice.

run over the second appropriator's lands and so on until eventually the water returns to the river or to another diversion canal. The evidence specifically showed that all appropriators *could* irrigate their lands by direct diversions but that it is much more efficient to use a large canal and the return flow method. The vested water rights recognized by the Decree are rights to direct diversions from the stream system, which may be exploited by use of return flows from other lands.

This Decree therefore does not differentiate between water right land irrigated by direct diversions and water right land irrigated by return flows. The return flow method should be encouraged as it appears to be a more economical, practical method of water distribution than hundreds of small direct diversion ditches.

SEGMENTATION OF THE RIVER IN ENFORCING PRIORITY RIGHTS.

The evidence shows that the physical characteristics of the Carson River do not nicely conform to strictly traditional legal concepts of enforcing priorities. Under a pure or theoretical view, a senior priority appropriator on a river should never go without water when a junior priority appropriator has water. The Carson River system presents several obstacles to the application of this theoretical concept.

First, the upper reaches of the river are separated into two forks: the East Fork and the West Fork. These different branches of the river are, until close to their confluence, separated by a considerable distance and varied topography, including steep foothills. An example, then, of the difficulties presented is a situation where there is

a senior appropriator on the West Fork and a junior appropriator on the East Fork and the senior user is low on water yet the junior user has a full supply. There is no physical way to deprive the junior user to satisfy the senior user.

A second example of the peculiarities of the river system is the late season appearance and disappearance of water from the river bed. The testimony indicated that in the late summer when the river is quite low, the river bed will be entirely dry for some stretches but that water reappears further downstream. The reappearance of water is the result of underground drainage from upstream irrigation or surface return flows from irrigation. This water is then available for use further downstream. This state of affairs makes it virtually impossible to "bring" water from an upstream junior appropriator down to a senior appropriator.

The Court is presented with a conflict between the pure theory of priority rights and the practical realities of the river system. In effect, this conflict is between the priority concept and the well-established principle of western water law that water must be economically, practically and beneficially used, so far as is possible. In this Court's view, the waste of water must be avoided, for wasted water benefits no one. Thus, the pure priority concept, which would waste large amounts of water and other resources were it to be strictly applied, must be modified. For these reasons, the Court finds that the river must be divided into 8 segments.[4]

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[4]See the Decree for a specific description of the segments and subsegments.

Each of these 8 segments shall be treated autonomously once the river is on regulation. For example, the Water Master shall distribute water in Segment 3 in accordance with the priorities in the limits of Segment 3. The Water Master shall not enforce a senior priority in one segment of the river against a junior priority in another segment of the river. The Court finds that this arrangement provides for by far the most economical and beneficial use of the available water and the most practical rule for administration by the Federal Water Master.

PROVISIONS REGARDING CHANGES IN THE PLACE OF DIVERSION, PLACE OF USE AND MANNER OF USE.

It appearing to the Court that the state law procedures for change applications are markedly different in California and Nevada, the Court adopts a different approach as to each state.

A. *Nevada*—Nevada's comprehensive scheme of water rights regulation is found in Chapters 532-544 of the Nevada Revised Statutes. N. R. S. 533.325 requires any appropriator who wishes to change the place of diversion, manner of use or place of use of water already appropriated to make an application to the State Engineer for a permit for such a change. N. R. S. 533.345-533.365 discuss application contents, notice procedures, protest procedures and other administrative details. N. R. S. 533.370 sets forth the State Engineer's duties in approving or rejecting applications. N. R. S. 533.370(4) states:

> "Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or threatens

> to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for."

The testimony presented by the State of Nevada at trial further indicated that the State Engineer considers it his duty to reject change applications which would adversely affect the rights of other appropriators.

Clearly under this statutory scheme the State Engineer has the authority and expertise to address change applications on an individual basis. This Court, of course, has the power to review decisions by the State Engineer. *See* N. R. S. 533.450. Since the State Engineer's decisions are governed by the correct legal principle that change applications are not permitted where other, and even junior, priority users would be adversely affected. *Clark on Waters and Water Rights,* Vol. 5, page 158; Trelease, *Changes and Transfers of Water Rights,* 13 Rocky M. M. L. Inst. 507 (1967), and in view of the existing comprehensive regulatory scheme, all Nevada change applications will be directed to the State Engineer and will be governed by Nevada law.

This Court has drawn a distinction in this opinion and decree between the water duty allowed for proper irrigation and the net consumptive use of the surface water. The State Engineer is directed that change of manner of use applications should only be permitted for the consumptive use amounts determined in this decree (2.99 acre-feet per acre for the areas below Lahontan Reservoir and 2.5 acre-feet per acre for the areas above Lahontan Reservoir) when use is changed from irrigation to any other purpose. Water that has been allowed in the duties for purposes of irrigation coverage could not then be

changed to a consumptive use and disappear from the return flows to other water right lands or the river.

B. *California*—California law for change procedures does not provide adequate advance protection of all interests in all circumstances. Therefore all petitions for changes in place of diversion, manner of use or place of use must be submitted to this Court. As noted above, a change from irrigation use to any other use will only be permitted for the consumptive use amount. Riparian rights as recognized by California law shall be fully enforced and protected.

A special hearing was held on October 15, 1980 concerning claims of the United States to reserved rights for water on the Toiyabe National Forest. At the conclusion of the hearing three classes of rights were recognized and have been included in the tabulations in the final Decree. In addition, the United States asserted a reserved claim to certain instream flow rights in the streams and tributaries above the Nevada-California state line. The claim asserted is that the rate of flow in the stream system should not be permitted to fall below the mesne monthly rate of flow at nine gauging stations based on data compiled by the United States Geological Survey. The compilation of such data was received in evidence as Exhibit E. The evidence to support the assertion that maintenance of such minimum flows is necessary for watershed protection and timber production (the purposes of national forest reservations) was insignificant. We interpret *United States v. New Mexico,* 438 U. S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) as not recognizing a reserved right to instream flows in these circumstances.

Nevertheless, it will be appropriate in the future for the Nevada State Engineer and this Court to take into consideration the effect of any proposed change of place or manner of use or point of diversion upon the average mesne monthly flows at the several gauging stations as established by the evidence referred to.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. D-183

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALPINE LAND & RESERVOIR COMPANY,
a corporation, et al.,

Defendants,

PYRAMID LAKE PAIUTE TRIBE,
Applicant in Intervention.

ORDER ON MOTION OF PYRAMID LAKE PAIUTE TRIBE TO INTERVENE AS A DEFENDANT, COUNTERCLAIMANT AND CROSS-CLAIMANT

(Filed January 6, 1969)

The Pyramid Lake Paiute Tribe of Indians on March 4, 1968, filed a Motion to Intervene as a Defendant, Counterclaimant and Crossclaimant. The Motion recites:

"The Pyramid Lake Paiute Tribe moves for leave to intervene as a defendant, counterclaimant and

crossclaimant in this action in order to assert the defenses and claims set forth in its proposed answer, counterclaim, and crossclaim, a copy of which is attached to this motion and is incorporated herein. Applicant has an interest in the subject-matter of this lawsuit, the representation of its interest by existing parties is inadequate, the disposition of this action may impair applicant's ability to protect its interest, and applicant's position has questions of law and fact in common with the issues in this action."

Applicant's Motion to Intervene and the above papers were fastened together and were filed as one document with the Clerk of the above entitled Court on March 4, 1968.

Applicant's first point is that it is entitled to intervene as a matter of right under Fed. Rules Civ. Proc. rule 24(a), 28 U. S. C. A. On page 3 of applicant's memorandum filed with its motion, the portion of Rule 24(a) relied upon is set forth as follows:

"Rule 24(a), Federal Rules of Civil Procedure, provides in part:

"'Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'"

In support of its contention, applicant, beginning at line 18 of page 3 of its memorandum filed with the motion, states the following:

"The following considerations warrant a finding that applicant is entitled to intervene as a matter of right under this rule.

"A. *The Representation of Applicant's Interest By Existing Parties Is Inadequate.*

"1. *Applicant's Interest in this lawsuit.*

"This lawsuit seeks to determine priorities to water of the Carson River Basin. The final decree which the Court will enter in this case will vitally affect economic and proprietary interests of the Paiute Indians. The decree may impair the rights of the Paiute Indians in the Truckee River, and in the absence of applicant's intervention, applicant will be unable to protect its interest in that stream, which is used in conjunction with the Carson River in irrigating the federal Newlands Reclamation Project."

Plaintiff, United States of America, on April 19, 1968, filed its "Memorandum of Reasons and Points and Authorities in Opposition to Intervention of Pyramid Lake Paiute Tribe." Beginning on page 1 of its said memorandum, the plaintiff asserts the following stated reasons as grounds of its opposition to the motion of Pyramid Lake Paiute Tribe of Indians to intervene:

"The application to intervene is not timely.

"The United States denies that Applicant has an interest in the subject matter of this action, as required by Rule 24(a), F. R. Civ. P.

"What interest Applicant does have in Truckee River, diversions, however, is adequately represented by the United States.

"Applicant, having no right to intervene in this suit, would, should it be allowed to do so, divide the management of plaintiff's suit." [See B. on page 9 through page 13 of plaintiff's said memorandum.]

"In addition, there would be no abuse of discretion if the court denied intervention under Rule 24(b), F. R. Civ. P."

In support of its contention that the application of Pyramid Lake Paiute Tribe is not timely, the plaintiff, United States of America, beginning on line 3 of page 2 of its memorandum filed April 19, 1968, argues and states the following:

"Timeliness

"Both Rules 24(a) (Intervention of Right) and 24(b) (Permissive Intervention) provide that intervention should be timely. A serious question is raised by the date of the application to intervene, which comes 43 years after the commencement of the suit:

"(a) Service was had upon the defendants in 1925. The complaint was filed May 11, 1925.

"(b) The trial of the case has been long completed. Evidence was taken from 1929 to 1941. The evidence was closed in 1941.

"(c) The United States filed its trial brief stating its position in the case based on the record on or about December 6, 1944.

"(d) On March 24, 1950, the court entered an order titled Preliminary Determination and Adjudication and Temporary Restraining Order and also appointed a water master to administer the river in accordance therewith.

"(e) On September 18, 1951, Special Master John V. Mueller filed his Findings of Fact, Conclusions of Law and Decree. On July 14, 1958, Mueller filed amendments to his Findings, etc.

"All that remains to be done in this case, as the court is aware, is to make certain substitutions, dispose of pending motions, and to enter a final decree.

> With the aid of the Water Master, Claude Dukes, the United States has prepared a list of substitutions which is substantially complete. In addition, plaintiff is presently engaged in what we believe to be fruitful negotiations with attorneys for the defendants to resolve a form of final decree that will eliminate the need for the filing of formal objections to the master's report.
>
> "Whether, in light of all the above, the Applicant's motion is timely is highly doubtful."

In view of the foregoing, it is apparent that the motion to intervene is not timely as required by Fed. Rules Civ. Proc. rule 24(a), 28 U. S. C. A., and for the reason stated above, the Court should and does hereby deny the motion of the Paiute Indians to intervene in this action. However, the Court feels it proper to consider each and all of the grounds of the plaintiff's objections to the motion.

In support of its denial that the applicant for intervention has an interest in the subject matter of this action as required by Fed. Rules Civ. Proc. rule 24(a), plaintiff, United States, beginning on page 3, line 8 of its memorandum in opposition to said petition for intervention, states:

> "*Applicant's Interest*
>
> "Rule 24(a), F. R. Civ. P. (Intervention of Right) provides for intervention, *inter alia,* 'when the applicant claims an interest relating to the property or transaction which is the subject of the action. . . .' The United States denies that applicant has an interest in the property (or transaction) which is the subject of this litigation of the type embraced within the meaning of the words quoted from Rule 24(a). The United States admits that Applicant does have an in-

terest in diversions from the Truckee River, but the rights to make those diversions are the subject matter of another, and not of this, action. They are not in litigation here and cannot be affected by the final decree in this case."

The Court agrees with the plaintiff that applicant has not exhibited to the Court any right to divert water from the Carson River and, therefore, has not established that it is entitled to intervene herein under the provisions of Fed. Rules Civ. Proc. rule 24(a)(2), 28 U. S. C. A.

The Court also agrees that any interest applicant may have in Truckee River diversions is adequately represented by the United States.

NOW, THEREFORE, for the reasons stated in plaintiff's memorandum in opposition to intervention of Pyramid Lake Paiute Tribe and from a consideration of all the matters presented, the motion of said Paiute Tribe to intervene in this action should be, and is heremy, DENIED.

DATED: This 3d day of January, 1969.

/s/ Roger T. Foley

U. S. Senior District Judge.

APPENDIX H

UNITED STATES of America,

Appellee,

vs.

ALPINE LAND AND RESERVOIR COMPANY et al.,

Appellees,

Pyramid Lake Paiute Tribe, Applicant for Intervention,

Appellant.

No. 24156.

United States Court of Appeals, Ninth Circuit.

Aug. 24, 1970.

Rehearing Denied Oct. 2, 1970.

CRARY, District Judge:

The Pyramid Lake Paiute Tribe (hereinafter The Tribe) appeals from an Order of United States District Judge Roger T. Foley, District of Nevada, filed January 6, 1969, denying motion of The Tribe to intervene as a defendant, counter-claimant and cross-complainant.

The Tribe sought to intervene by motion filed last March 4, 1968, seeking adjudication of "the relative rights of all parties to this suit in and to the water of the Carson River and its tributaries." The motion to intervene was denied by the Court on the grounds that (1) it was *not timely* within the provisions of Rule 24(a), Federal Rules of Civil Procedure; (2) The Tribe has *no interest* in the waters of the Carson and, therefore, is not possessed of the requisite interest relating to the property or trans-

action which is the subject of the action, as required by Rule 24(a) and (b), supra; and (3) *any interest* The Tribe might have in the Truckee River water which might be the subject of diversion is *adequately represented by the United States.*

This Court concludes that, for the reasons hereafter discussed, The Tribe's motion to intervene was not timely made nor does The Tribe have the requisite interest in the subject matter of the instant litigation to entitle it to intervene.

FACTUAL BACKGROUND

The within action was instituted by the United States in *1925* in the United States District Court, Nevada District, against more than four hundred original defendants to quiet title to the Government's rights and to fix the relative rights of the defendants to Carson River waters. Evidence was received by a Special Master between 1929 and 1940. In its Opening Brief, filed in 1941, the United States observed that there were 381 defendants who claimed 646 separate water rights to the Carson River for the irrigation of 49,700 acres of land *upstream* from the Lahontan Reservoir. See the sketch of the Carson-Truckee River watersheds including Lahontan Reservoir, the Truckee Diversion Canal, Pyramid Lake and the Newlands Reclamation Project area, Exhibit A, to this opinion.

In June, 1949, the District Court entered a Temporary Decree and appointed a Water Master to administer the Carson River. A second Order, almost identical with that filed in June, 1949, was filed on March 24, 1950. These orders, and the appendix and exhibits thereto, incorporated therein by reference, are referred to as the "Temporary

Decree". The Water Master has administered the Carson River waters under this Decree to the present time.

The Tribe, by its motion to intervene and pleadings filed in March, 1968, claimed it had water rights in the Truckee River and in Pyramid Lake. It seeks adjudication of the relative rights of all parties to the suit to the waters of the Carson and its tributaries and the enforcement of the "Temporary Decree" by the Water Master. On November 27, 1968, The Tribe moved to amend its pleadings requesting that the Secretary of Interior be made a party to the action.

The Tribe asserts that the Carson and Truckee rivers have been unitized under Regulations, 43 C. F. R. 418.1-5, and Order of the Under-Secretary of the Interior (32 Fed. Reg. No. 190, page 13733, Sept. 30, 1967) issued in February and September, 1967, and by the operation of the Newlands Reclamation Project, including the Truckee River Diversion Canal, whereby, under given circumstances, water would be diverted from the Truckee River to the Lahontan Reservoir on the Carson River. With respect to the use of waters for the Newlands Project, the Regulations (Section 418.3) adopted by the Department of Interior in 1967, supra, required maximum use of Carson waters in satisfaction of the Truckee-Carson Irrigation District water settlements and the minimizing of the diversion of the flow of Truckee waters to the Lahontan Reservoir for said District's use in order to make available to Pyramid Lake as much water as possible. The Newlands Project was and is operated by the said Irrigation District for and on behalf of the Government. Commenced in 1905, the Project was constructed by the Department of Interior under the Reclamation Act of June 17, 1902. [32 Stats. 388.] It lies downstream from the Lahontan Reservoir.

In support of its motion to intervene, The Tribe relies on its right to or interest in the waters of the Truckee as determined in the Decree in the case of United States v. Orr Water Ditch Co., No. A-3, District Nevada, 1946. That Decree declared the rights of the United States to Truckee River waters and the rights of the United States as to water from the Truckee River for the Newlands Project with a priority of 1902. It also decreed specified water rights in the Truckee for The Tribe for irrigation of certain lands on the Pyramid Lake Indian Reservation. This award had a 1859 priority and consequently vested in The Tribe water rights in the Truckee which take precedence over the rights to Truckee waters for the Newlands Project.

The United States has been and continues to seek, by negotiation, the largest water entitlement from the Carson River it can obtain for the Lahontan Reservoir, from which water is taken for the Newlands Project.

THE MOTION TO INTERVENE WAS NOT TIMELY FILED

Rule 24(a), Federal Rules of Civil Procedure, provides for the right to intervene "upon timely application." As noted above, The Tribe's motion to intervene was filed some forty-three years after the filing of the complaint and about twenty-seven years after the trial was concluded, and after the demise of most of the witnesses who testified from memory concerning early appropriations of Carson River waters.

The Tribe urges that it was first authorized to sue in its behalf by the enactment of Title 28, United States Code, § 1362, in 1966. That Section provides that the Dis-

trict Courts shall have original jurisdiction of all civil actions brought by any Indian Tribe or Band, with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises under the Constitution, laws or treaties of the United States. The aid of Section 1362 was not required to afford The Tribe the right to intervene in the within action, where jurisdiction was already vested in the Court, if the Tribe possessed the requisite interest in the subject matter of the suit. The Section was for the purpose of giving jurisdiction to United States District Courts of certain civil cases brought by Indian Tribes in their own name in the said courts where but for the statute the Court would not have had jurisdiction for lack of required amount in controversy, or otherwise. See Yoder v. Assiniboine and Sioux Tribes of Fort Peck Ind. Res., 339 F. 2d 360 (9 C. A. 1964), where there was lack of jurisdictional amount in controversy, and Scholder v. United States, 428 F. 2d 1123, 9th Circuit, 1970.

The Tribe also asserts that the Regulations, 43 C. F. R. 418-5, supra, which unitized the Carson and Truckee rivers were not issued until February, 1967, and that it did not, until that time, have reason to conclude that the United States was not representing its interests. It further contends that Rule 24, supra, does not apply to Indians.

The Regulations and Order, supra, relate only to the rights of the United States. They clearly provide for the benefit of The Tribe in that they maximize the use of Carson waters and minimize the diversion of Truckee waters for the Truckee-Carson Irrigation District's water entitlement. Neither the Regulations nor the Order indicate that The Tribe's interests were not being represented by the United States.

The "timely application" requirement of Rule 24 applies to Indians as well as other litigants. The Rule concerns a procedural matter and is not a statute of limitation barring substantive rights. The instant action is not one wherein The Tribe is about to lose water rights for failure to assert them. No water rights of The Tribe are being adjudicated by the Court in the instant case, as was true in the cases cited by appellant Tribe in support of its contention that The Tribe's motion to intervene was timely.

For example, the case of United States v. Ahtanum Irrigation District, 236 F. 2d 321 (9 C. A. 1956), cited by the appellant, involved a suit filed by the United States as Trustee for an Indian Tribe to quiet title to the Indians' right to use waters of a creek allegedly reserved by treaty between the United States and The Tribe. The Court held that in the circumstances no defense of laches, estoppel, or delay, was available to defendants, observing at page 334 of the opinion that the law forbids acquisition of Indian lands, or any title or claim thereto, except by treaty or convention. The claims were to the waters *in suit.*

At the time The Tribe's motion to intervene was filed the Court was advised by the Government in its memorandum of points and authorities in opposition to intervention filed April 19, 1968:

> "All that remains to be done in this case, as the court is aware, is to make certain substitutions, dispose of pending motions, and to enter a final decree. With the aid of the Water Master, Claude Dukes, the United States has prepared a list of substitutions which is substantially complete. In addition, plaintiff is presently engaged in what we believe to be fruitful negotiations with attorneys for the defendants to resolve a form of final decree that will eliminate the need for filing of formal objections to the master's report."

Judge Foley points to the facts quoted above in his Order denying The Tribe's motion to intervene.

This Court concludes that The Tribe's motion to intervene was not timely made within the provisions of Rule 24(a) or (b), Title 28, United States Code.

THE TRIBE IS WITHOUT INTEREST IN THE CARSON RIVER WATERS

The Tribe asserts that by reason of the unitized operation of the Carson and Truckee rivers and the provision for diversion of Truckee waters to the Carson to replace Carson waters used for the Newlands Project, that The Tribe's water rights in the Truckee River are involved.

The pending suit is to quiet title to water rights of the parties to the within action in only Carson River waters. The Tribe has no interest in the subject of this suit and its water rights to the Truckee River are not involved.

The Tribe may have water rights in the Truckee other than its rights to irrigation water from the Truckee, as determined by the Court in United States v. Orr Water Ditch Co., supra, under the principle announced in Winters Doctrine, Winters v. United States, 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

In Arizona v. California, 373 U. S. 546, 600, 83 S. Ct. 1468, 1498, 10 L. Ed. 2d 542 (1962), the Supreme Court states:

> "The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court

as recently as 1939 in *United States v. Powers*, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act.

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

The Tribe contends that the Winters Doctrine has been expanded, citing Alaska Pacific Fisheries Co. v. United States, 248 U. S. 78, 89, 39 S. Ct. 40, 63 L. Ed. 138 (1918) (fishing rights); and Arizona v. California, supra.

If The Tribe has water rights in the Truckee not vested by the Decree in the *Orr Water Ditch Co.* case, supra, they may not properly be asserted or adjudicated in the within *litigation*. The issue of any possible additional rights of The Tribe to the waters of the Truckee are not before this Court and we make no determination thereof.

The Court concludes that Cascade Natural Gas Corp. v. El Paso Natural Gas, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), relied on by appellant, does not support The Tribe's position that it is affected within a "practical sense" under Rule 24(a) (3), Federal Rules of Civil Procedure. In the *Cascade* case, the Court held that the State of California and the Southern California Edison Company were entitled to intervene under Rule 24(a) (3) because they had an interest in the competitive system which the

mandate in the first appeal in that case was designed to protect and which was being "adversely affected", within the meaning of the Rule, by a merger. Cascade was allowed to intervene under Rule 24(a) (2) by reason of its interest in the "transaction which is the subject of that action." [Opinion, p. 135, 87 S. Ct. p. 937.] Each applicant, the Court said, had an interest in the subject of the litigation which was entitled to protection. In the case at bench, The Tribe has no water rights in the Carson River and its claimed rights in the Truckee cannot be affected by the Decree adjudicating water rights in the Carson.

The Tribe's reliance on United States v. Martin, 267 F. 2d 764 (10 C. A. 1959), is not well founded, as the intervenors in that case claimed a right to overflow waters of the Colorado River, the waters of which were the subject of a suit. The action was by the United States and sought an adjudication of water rights affected by a water diversion project financed with Federal funds. The intervenors, owners of ranch lands which lost the benefit of natural irrigation from overflow of the Colorado River, sought recovery for injuries sustained. Unlike the facts in the *Martin* case, The Tribe's rights to Truckee water have not been divested by the diversion of Truckee water to the Carson (Lahontan Reservoir).

The Tribe does not show how any settlement of this case will in any way alter its rights or interest in the waters of the Truckee as established by the Decree in United States v. Orr Water Ditch Co., supra, or otherwise. As noted above, The Tribe's interest in the Truckee has an 1859 priority and will be filled before water could be diverted by the owners of any subsequent interest or right. Any diversion to the Newlands Project, or subsequent project,

which would encroach upon the earlier rights of The Tribe, would be a violation of the "Truckee River Decree", entered in the *Orr Water Ditch Co.* case.

The Order of the District Court denying the appellant Tribe's motion to intervene in the within action is affirmed.

No. 82-1723

In The
Supreme Court of the United States
October Term, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,

Respondents.

SUPPLEMENTAL MEMORANDUM FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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Pursuant to Rule 22.6 of the Rules of the Court, the Pyramid Lake Paiute Tribe of Indians files this Supplemental Memorandum to inform the Court of the decision by the United States District Court for the District of Nevada in *Truckee-Carson Irrigation District (TCID) v. Secretary of the Interior,* No. R-74-34 BRT (Aug. 17, 1983). That suit was brought by TCID, the principal respondent in the instant case, to prevent the Secretary from cancelling the 1926 Contract between TCID and the United States pursuant to which TCID operates the Newlands Reclamation Project. As discussed at page 9 of the Tribe's Petition, in 1973 the Secretary informed TCID of his intent to cancel the 1926 Contract because TCID refused to adhere to the criteria adopted by the Secretary to govern the operations of the Newlands Project.

In its August 17, 1983 Opinion,[1] the district court upheld the Secretary's decision to terminate the Contract, concluding (1) that the Secretary had reserved the authority in Articles 7 and 34 of the 1926 Contract to promulgate rules and regulations for operation of the Project (slip op. 16-18, 20), (2) that the operating criteria were otherwise validly established (*id.* at 9-14), and (3) that TCID had openly defied the operating criteria, permitting cancellation of the 1926 Contract (*id.* at 3-4, 19-22). The Court also held that the operating criteria are fully consistent with the decree in *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944) because that decree simply imposed a maximum limitation on the amount of water diverted by the United States and provided for the use of water "under such control, disposal

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[1]We have lodged twelve copies of the district court's opinion with the Clerk of the Court.

and regulation as the [United States] may make or desire." (slip op. 13)[2]

The holding that the Secretary's operating criteria are valid reinforces the Tribe's contention that it has an interest in the present case because the criteria were adopted to conserve Truckee River water for Pyramid Lake. *See* 43 C. F. R. § 418.1(b). The decision also confirms that the *Orr Ditch* decree did not establish an entitlement in individual landowners to receive Truckee River water to furnish 3.5 and 4.5 acre feet per acre (afa) to Project lands. *See* note 2, *supra*. In both respects, the district court decision strengthens the case in favor of the Tribe's intervention.

The district court decision also increases the importance of reviewing the merits of the instant case. The Ninth Circuit's holding in this case that project water users are entitled to 3.5 or 4.5 afa notwithstanding the 3 afa contract limitation may affect future operating criteria, the Secretary's operation of the project, and ultimately the amount of the Truckee River water that flows into Pyramid Lake. Now that the district court has upheld the Secretary's authority to issue the criteria and his decision to terminate the 1926 contract, the issue of whether the contractual limitations are valid and binding greatly increases the practical significance of this case.

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[2]The district court's decision therefore confirms that, contrary to TCID's assertion in the instant case (TCID Br. in Opp. 8-9, 11), the decree in Orr Ditch did not establish an absolute right of individual Newlands Project water users to receive 3.5 and 4.5 acre feet per acre (afa) for their lands. Those were simply the maximum limitations on the United States' diversion; the scope of the water rights of individual Project water users is defined by their water right contracts with the Secretary, the majority of which limit deliveries to 3.0 afa.

Accordingly, the Tribe is vitally interested in limiting the Project water duties to the 3.0 afa contained in the water users' contracts. That issue warrants this Court's review.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

TRUCKEE-CARSON IRRIGATION DISTRICT,

Plaintiff,

vs.

SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Defendant,

vs.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Defendant-Intervenor.

Civil R-74-34 BRT

MEMORANDUM OPINION

This is an action by the Truckee-Carson Irrigation District to prevent the Secretary of the Interior from terminating TCID's contract to operate the Newlands Irrigation Project. The Secretary's termination of the contract was based on numerous violations of criteria issued by the Secretary concerning operation of the project. TCID seeks a declaration that these criteria are void and an injunction prohibiting termination of the contract. The Government and the Intervenor, Paiute Tribe, pray for a declaration that the Secretary of Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to

possession and control of the Newlands Reclamation Project effective as of November 1, 1974.

Final decision of this case has been deliberately delayed by this Court because of the pendency of companion litigation to which the TCID was an indispensable party as the convenient representative of a large class of interested parties, namely, the owners of water rights under the Newlands Irrigation Project. Although other litigation is still pending, the two most important lawsuits have been decided: United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983) (the adjudication of use of the waters of the Carson River), and Nevada v. United States ___U.S.___, 51 L.W. 4974, June 24, 1983 (the adjudication of use of the waters of the Truckee River).

On December 18, 1926, the Secretary of the Interior (Secretary) and the Truckee-Carson Irrigation District (TCID) signed a contract which transferred the care, operation and maintenance of the Newlands Reclamation Project to TCID. Under this contract the Secretary retained the authority to issue rules and regulations concerning the operation of the project. Pursuant to this authority the Secretary has issued criteria regulating TCID's operation of the project since 1967.

In September 1972, the Secretary issued operating criteria for the period from November 1, 1972 through October 31, 1973. These operating criteria were challenged by the Pyramid Lake Paiute Tribe in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1972). The Tribe contended that the operating criteria allowed more water to be delivered to the project than required by applicable court decrees and statutes

and, thus, diverted water that otherwise would flow into Pyramid Lake. The Court reviewed the Secretary's regulations and found them to be unsupported by the administrative record. Consequently, the Court directed the Secretary to submit proposed amended regulations. The Court's final judgment and order included amended operating criteria which were to govern operation of the project for the remainder of the 1972-73 water year and the water year beginning November 1, 1973.

The approved operating criteria were mailed to TCID on March 7, 1973, and were published in the Federal Register on March 12, 1973. TCID admits, however, that these criteria were never implemented. Paragraph XVIII of the complaint reads, in part:

> Truckee-Carson Irrigation District has refused and continues to refuse to comply with the so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published in the Federal Register by the Acting Secretary of Interior on or about March 12, 1973.

This refusal to comply with the operating criteria was substantiated by evidence produced at trial.

Richard Lattin, a member of the Board of Directors of TCID, appeared on behalf of TCID and testified to numerous violations of the operating criteria. The following were among the violations Lattin testified to: (1) TCID delivered water to non-water right lands; (2) TCID allowed individuals who were not TCID employees to operate turnouts; (3) TCID did not develop a system to measure the amount of water delivered to customers; (4) TCID did not establish a system to charge for water actually delivered; and (5) TCID diverted more water from the Truckee River than

authorized.

The administrative record before the Court also evidences TCID's refusal to comply with the operating procedures. The record shows that diversion of water from the Truckee River exceeded the amount authorized for the months of April, May, June, July, and August of 1972. After each of these violations TCID was given notice of the excessive diversion. TCID made no effort to reduce the diversion of water and comply with the operating criteria.

In addition to the excessive diversion of water, the record also evidences other violations of the operating criteria. The following violations were identified in a report on TCID's compliance dated May 22, 1973: (1) TCID delivered water to non-water rights lands; (2) TCID allowed individuals who were not TCID employees to operate turnouts; (3) TCID failed to develop a plan for measurement of water flows; and (5) TCID failed to submit a monthly report. This compliance report was sent to TCID, yet TCID made no effort to bring itself into compliance. Consequently, a second compliance report dated August 8, 1973, identified the same violations as the May 22nd report.

Confronted with TCID's continued violation of the operating criteria, the Secretary chose to terminate the 1926 contract. By letter dated September 14, 1973, the Secretary notified TCID that the contract would be terminated on October 31, 1974. TCID filed the present action on March 18, 1974, to enjoin the termination of the contract.

There are four general issues raised by the parties. The issue which must be addressed first is the Secretary's chal-

lenge to this Court's jurisdiction based on the doctrine of sovereign immunity. The second general area of issues centers around TCID's claim that the operating criteria are invalid. TCID argues that the operating criteria are invalid because (a) the criteria were not issued in accordance with the procedure prescribed by the Administrative Procedures Act; (b) the criteria were in excess of the Secretary's authority; and (c) the criteria were arbitrary and capricious. The third general issue concerns TCID's challenge to the enforceability of the operating criteria. TCID argues that the criteria cannot be enforced because (a) TCID was not a party in Tribe v. Morton, the case in which the criteria were formulated; (b) the criteria unconstitutionally impair the 1926 contract, and (c) the Secretary did not comply with the requirements of the National Environmental Policy Act. The fourth issue concerns TCID's noncompliance with the operating criteria and whether this noncompliance constitutes a breach of the 1926 contract.

I

SUBJECT MATTER JURISDICTION

Defendants have repeatedly asserted that this Court lacks subject matter jurisdiction to hear this case because of the doctrine of sovereign immunity.[1/] It is firmly established that "the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1056 (1941). See also United States v. Testan, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). "Unless

sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States." Beller v. Middendorf, 632 F.2d 788, 796 (9th Cir. 1980), cert. denied, ___U.S.___, 101 S.Ct. 3030 (1981). Although the boundaries of this doctrine are in a constant state of flux, their present demarcation in the Ninth Circuit indicates that sovereign immunity is not a bar to this action.

Paragraph II of the complaint sets forth two grounds upon which plaintiff predicates federal court jurisdiction in this action. It reads as follows:

> The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1331(a), as the amount in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the laws of the United States, as hereinafter more fully appears. The jurisdiction of this court is also invoked pursuant to the provisions of 5 U.S.C. 701-706, inclusive, in that plaintiff Truckee-Carson Irrigation District is suffering legal wrong because of agency action, or is adversely affected or aggrieved by agency action within the meaning of a relevant statute. This action is properly brought in this court against the defendant Secretary of Interior pursuant to 28 U.S.C. 1391(e).

The allegations in the complaint generally set forth the following federal questions under 28 U.S.C. § 1331: Plaintiff has generally alleged (1) that the 1973 operating criteria were promulgated in a manner contrary to the National Environmental Policy Act of 1969 and the procedural due process protections of the Fifth Amendment; (2) that the substance of the operating criteria violates Fifth Amendment guarantees; and (3) that the Secretary's termination of the 1926 contract pursuant to

the constitutionally void operating criteria was illegal. Plaintiff's claims, therefore, fall within statutory "federal question" jurisdiction because they involve rights created by the Constitution and laws of the United States which are an essential element to the existence of each claim. In short, plaintiff challenges rules and regulations promulgated by the Secretary, and action taken pursuant thereto, which allegedly cannot be justified under the Constitution or laws of the United States.

According to paragraph II, plaintiff has also asserted jurisdiction under the provisions of the Administrative Procedures Act (APA), 5 U.S.C. § 701, et seq. At the time this action was commenced, many courts thought that the APA, in and of itself, afforded an implied grant of subject matter jurisdiction for review of agency action. K.C. Davis, Administrative Law Treatise, § 23.02 (1st ed., Supp. 1982). The decision in Califano v. Sanders, 430 U.S. 99, 105, 61 L.Ed.2d 192, 97 S.Ct. 980 (1977), however, established that the APA is not an independent jurisdictional predicate. It is now considered sufficient to rest an action for agency review upon federal question jurisdiction. Chrysler Corp. v. Brown, 441 U.S. 281, 317 n. 47 (1979); Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 607 n. 6 (1978); Glacier Park Foundation v. Watt, 663 F.2d 882, 885-86 (9th Cir. 1981); McCartin v. Norton, ___F.2d___, decided April 22, 1982, Adv. Sh. 1659 (9th Cir. 1982). Jurisdiction of the present case rests solely upon 28 U.S.C. § 1331.

Although the APA provisions have lost their force as an independent jurisdictional predicate, they have taken on new significance in the area of sovereign immunity. In 1976, Congress

amended Section 702 of the Administrative Procedures Act to waive sovereign immunity in suits seeking judicial review of agency action, where the relief sought is other than money damages. 90 Stat. 2721 (1976). Section 702, as amended, now provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Unfortunately, the parties to this action have for the most part overlooked the impact that amended Section 702 has had on the doctrine of sovereign immunity. In addressing the issue of sovereign immunity, the parties have revived pre-1976 sovereign immunity case law, principally, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 L.Ed.2d 1628, 69 S.Ct. 1457 (1949), and its progeny, to resolve this jurisdictional issue. In light of the recent trend in the circuit courts to apply the waiver of sovereign immunity contained in Section 702 to "non-

statutory"[2/] review actions brought under Section 1331, it is unnecessary to decide whether pre-1976 sovereign immunity law provides an alternate ground, independent of 5 U.S.C. § 702, for finding sovereign immunity inapplicable to plaintiff's claim for equitable relief. This decision to apply 5 U.S.C. § 702 to the present case rests primarily upon the following cases: Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 101 S.Ct. 2047 (1981); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132 (5th Cir. 1980); Jaffe v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

Thus, the waiver of sovereign immunity found in the APA applies to this case if the requirements of Section 702 are satisfied. Under Section 702 the lawsuit must seek relief other than money damages and state a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority. It is clear that these requirements are met in the instant case. Plaintiff's claims seek declaratory relief from actions of the Secretary of Interior which were allegedly taken pursuant to constitutionally void rules and regulations.

II

VALIDITY OF THE OPERATING CRITERIA

A. Promulgation of the Amended Operating Criteria.

The operating criteria challenged in the present case were formulated and approved by the court in Tribe v. Morton. The Secretary published the operating criteria in the Federal Register in accordance with the court order. TCID contends that

this method of promulgation violated the requirements of the Administrative Procedures Act (APA).

The APA provides the procedural standard which must be followed before an agency may take any action. Under the APA the agency is required to follow different procedures depending on whether the agency action was an adjudication or rulemaking. Thus, to determine if the proper procedure was followed, we must first determine whether the Secretary's issuance of the operating criteria involved an adjudication or rulemaking.

The distinction between adjudication and rulemaking is found in 5 U.S.C. § 551. "Adjudication" is defined in § 551(7) as "agency process for the formulation of an order." An "order" means "the whole or part of a final disposition . . . in a matter other than rulemaking" (emphasis added). "Rulemaking" is defined by Section 551(5) as "agency process for formulating, amending, or repealing a rule." Thus, the distinction between rulemaking and adjudication turns on the definition of "rule."

Section 551(4) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." Under this definition the operating criteria issued by the Secretary are rules. The standards contained in the operating criteria were designed to implement the policy behind the Reclamation Act of 1902. Moreover, the standards operated prospectively; they did not apply in any way to prior water years. Thus, under the APA the Secretary's issuance of the operating criteria was rulemaking and not adjudication.

As rulemaking, the procedure governing the issuance of

the operating criteria is contained in 5 U.S.C. § 553. Section 553(a), however, specifically exempts an agency when making rules regarding public contracts. This exception is included "because the principal considerations in most such cases relate to mechanics and interpretation of policy and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements . . . " Duke City Lumber Co. v. Butz, 382 F.Supp. 362 (D.D.C. 1974) quoting S.Rep. No. 752, 79th Cong., 1st Sess. 199 (1945). This exception embraces rules issued by an agency with respect to contracts of the United States or an agency of the United States. See Attorney General's Manual on the Administrative Procedure Act, p. 28 (1973).

In the present case, the Secretary's issuance of the operating criteria was pursuant to the 1926 contract, which specifically entrusted the Secretary with authority to issue rules and regulations. The 1926 contract is a contract between the United States and TCID. Therefore, the rules that the Secretary issues pursuant to the contract are not governed by the strictures of the APA.

B. Authority of the Secretary to Issue Operating Criteria.

TCID contends that the amended operating criteria were invalid when promulgated because they were in excess of the Secretary's authority. The operating criteria are claimed to exceed the Secretary's authority in three ways.

First, TCID claims that the requirements imposed by Section C of the operating criteria violated the Secretary's duty not to issue operating criteria which would make operation and maintenance of the irrigation project unduly expensive. The duty

upon which the claim relies arises from 43 U.S.C. §§ 390 and 504. Both sections authorize the Secretary to expend funds, but only within the limit of the water users' repayment ability. This limitation, however, only applies to situations where the Secretary has expended funds. There is no similar requirement on funds that the water district is directed to expend. See 43 U.S.C. §§ 485e, 485i, 492. The Section C requirements at issue in the present case did not require an expenditure of federal funds. The cost was to be borne directly by the water users. Therefore, the Section C requirements were not in violation of any duty of the Secretary.

Second, TCID contends that the operating criteria's provision for upstream storage of water at Stampede Reservoir violates 43 U.S.C. § 523. Section 523 provides, in part:

> Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act [43 USCS § 641], and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation.

TCID contends that this section requires the Secretary to enter a contract for storage of the water before he may issue a regulation requiring the upstream storage.

The contract requirement of Section 523 was designed to cover situations in which one irrigation system has water in excess of the amount required. In such a situation, the Secretary may contract for the transfer of the excess water to another irrigation system. The provision for upstream storage of water at Stampede Reservoir does not, however, dispose of excess water to another irrigation system. The provision merely coordinates the storage of water between Stampede Reservoir and Lahontan Reservoir. Since this provision for alternative storage did not transfer water to another system, Section 523 did not require the Secretary to enter a contract concerning the upstream storage.

Third, TCID contends that the Secretary did not have authority to limit TCID's diversion of water from the Truckee River to 350,000 acre feet for the water year ending October 31, 1973. This contention is without merit. The 1926 contract preserves the Secretary's right to issue rules and regulations. This includes the right to limit diversion of water from the Truckee River.

TCID, however, contends that the Secretary exceeded his authority by issuing regulations which were in violation of the Orr Ditch Decree. The Orr Ditch Decree granted the United States the right to divert water from the Truckee River for irrigation of the project. This water is "under such control, disposal and regulation as the [United States] may make or desire." The only limitation on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

C. Arbitrary and Capricious.

TCID contends that the operating criteria are invalid because the Secretary's promulgation of the criteria was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of 5 U.S.C. § 706(2)(A). To determine whether the Secretary's action was in violation of this section, the Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

The operating criteria under review in the present case were promulgated by the Secretary under the guidance of Judge Gesell. The court in Tribe v. Morton had ordered the Secretary to reconsider the written recommendations in the administrative record in light of his responsibility to the Newlands Project and the Pyramid Lake Indians. The final form of the operating criteria approved by Judge Gesell were found to be consistent with the Secretary's legal and fiduciary obligations. Tribe v. Morton, 354 F.Supp. at 261. This finding is not binding but it does indicate that relevant factors were considered and that no error of judgment was made. TCID has provided no evidence which would indicate that relevant factors were not considered or that the criteria approved by the court were clearly errors of judgment. Therefore, TCID's claim that Section 706(2)(A) has been violated must be denied.

III

ENFORCEABILITY OF THE OPERATING CRITERIA

///

A. Due Process Clause.

The key issue in the present case is whether the operating criteria approved by Judge Gesell in Tribe v. Morton can be enforced against TCID. TCID contends that the operating criteria were in essence a court order and that imposition of the operating criteria upon it results in the enforcement of a judgment rendered in a suit to which it was not a party.

TCID is correct in contending that due process requires that an individual not be bound by a judgment rendered in litigation to which the individual was not a party. Hansberry v. Lee, 311 U.S. 32 (1940); Mallow v. Hinde, 25 U.S. 193 (1827). The strictures of due process, however, only apply where the absent party will be deprived of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1971). Thus, before TCID may argue that the judgment in Tribe v. Morton deprived it of due process, it must demonstrate that an interest within the Fourteenth Amendment's protection is at stake. Id. at 571.

TCID contends that the operating criteria approved by the court in Tribe v. Morton have deprived it of three distinct property interests. First, TCID contends that the reduction in the amount of water which may be diverted from the Truckee River has deprived it of non-project water rights in Donner Lake and Independence Lake. The operating criteria, however, do not purport to alter TCID water rights in either lake. The criteria merely prohibit transporting water by means of the federally owned canal if such diversion into the canal would exceed the limit

established by the operating criteria. Thus, the operating criteria do not affect the non-project water rights, they only regulate the use of the federally owned canal.

Second, TCID contends that the Truckee River Agreement (TRA) granted it a right to the excess "diverted flow" reaching Derby Dam. TCID claims that this is a water right which it holds independent of the irrigation project and, thus, is a right which cannot be limited by the Secretary's operating criteria. The TRA, however, was not an adjudication of water rights. It was an agreement among the major water users and was subject to the final disposition of United States v. Orr Water Ditch Co., No. A-3. The final adjudication came in the form of the Orr Ditch Decree, which granted the United States a specific amount of water for use on the Newlands Project. No water rights were given to TCID as an entity. TCID's only interest in the water rights granted the United States by the Orr Ditch Decree arises from its management of the irrigation project under the 1926 contract. In this capacity, TCID's right to water is under the direct control and regulation of the Secretary. Thus, TCID's contention that the TRA grants it water rights independent of the irrigation project and the Secretary's control is without merit.

Third, TCID contends that the operating criteria have deprived it of the right to the continued operation of the irrigation project under the contract terms as they were originally formulated. TCID, however, had no right to continue the operation of the project in any specific manner. Under Article 7 of the 1926 contract, TCID agreed to operate and maintain the project in full compliance with "the rules and regulations of the Secretary

now in force or hereafter promulgated." The contract further provides:

> 34. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper, and necessary to carry out the true intent and meaning of the law and of this contract, and the District hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Since the Secretary had the right to change the regulations at any time, TCID could not have a property interest in the continued operation of the project in any specific manner.

TCID has failed to establish that it was deprived of any property interest by the operating criteria approved by the court in Tribe v. Morton. Consequently, imposition of the operating criteria upon TCID did not deprive it of due process.

B. Impairment of Contract.

TCID contends that the Secretary's enforcement of the operating criteria has impaired the 1926 contract in violation of the due process clause. The due process clause, like the contract clause limitation on states, prevents the federal government from rearranging contractual rights and responsibilities. See Northwestern National Life Ins. Co. v. Jordan, 447 F.Supp. 856 (D.Nev. 1978). TCID contends that the operating criteria's limitation on the diversion of water from the Truckee River has impaired its right under the contract to use water for power generation, for the pasture land, and for expansion of the project.

The Secretary has the right to promulgate rules and

regulations governing operation of the irrigation project. Within this power is the authority to limit water diverted from the Truckee River to that being beneficially used by those holding water rights. The Secretary's exercise of the power did not unconstitutionally impair the rights claimed by TCID because water used for the claimed rights may be restricted. The use of project water for power generation is secondary to its use for irrigation and, thus, may be restricted by the Secretary. See Burley Irr. Dist. v. Ickes, 116 F.2d 529 (D.C.Cir. 1940). The use of project water to irrigate the pasture land may also be restricted since there are no decreed water rights for use by direct diversion on the pasture land. United States v. Alpine Land & Reservoir Co., 503 F.Supp. 877, 882 (D.C. Nev. 1980). Finally, water may be used to expand the irrigated acreage only to the extent that water rights are obtained for the additional land. Thus, TCID's claim that the reduction in water to be diverted impaired its contract must fail, since water for the rights allegedly impaired may be limited by the Secretary in a good faith effort to avoid waste of water diverted from the Truckee River.

C. National Environmental Policy Act (NEPA).

TCID contends that enforcement of the operating criteria will violate NEPA because a reduction in the amount of water to be diverted at Derby Dam will have a significant effect on the quality of the environment. TCID is not the proper party to raise the issue.

TCID's purpose in pursuing the NEPA claim was not to promote governmental awareness of environmental problems, but was to protect its interest in continuing to operate the irrigation

project. NEPA was not intended to protect plaintiffs, such as TCID, whose sole motivation is their own economic self-interest and welfare. See Port of Astoria, Oregon v. Hodel, 595 F.2d 467 (9th Cir. 1979); Churchill Truck Lines, Inc. v. United States, 533 F.2d 411 (8th Cir. 1976); Clinton Community Hospital Cor. v. So. Md. Medical Center, 510 F.2d 1037 (4th Cir. 1975); American Motorcyclist Ass'n v. Watt, 534 F.Supp. 923 (C.D.Calif. 1981); Benton County Savings & Loan v. Federal Home Loan Bank Bd., 450 F.Supp. 884 (W.D.Ark. 1978).

IV

NONCOMPLIANCE WITH THE OPERATING CRITERIA

As previously discussed, the operating criteria were valid and enforceable regulations and, thus, TCID was required by the 1926 contract to implement them. The evidence uniformly demonstrates that TCID failed to comply with the criteria. This was a breach of the 1926 contract. Under the 1926 contract, the Secretary may terminate the contract for breach upon one year's written notice to TCID. The Secretary complied with this provision by mailing TCID a letter, dated September 16, 1973, which notified TCID that the contract would be terminated on October 31, 1974.

In a final effort to avoid the consequences of noncompliance, TCID argues that its breach of the contract is excused because compliance was financially impossible. Impossibility of performance is a valid defense in an action for breach of contract where an extraordinary circumstance has made performance so vitally different from what was expected as to alter the essential nature of performance. In the present case, however, the im-

possibility claim is not appropriate for two reasons: First, this is not an action for breach of contract. TCID has raised the impossibility claim offensively to reform the contract, instead of defensively. This is not a permissible use of the impossibility doctrine. Even if this claim were properly raised, it would fail because the Secretary's issuance of the operating criteria was not an extraordinary circumstance. Paragraphs 7 and 34 of the 1926 contract demonstrate that the parties contemplated the Secretary's periodic issuance of rules and regulations and operating criteria have been issued since 1967. TCID's financial inability to comply with the regulations does not turn this into an extraordinary event excusing performance. Restatement (Second) Contracts, § 261 Comment b (1981); 17 Am.Jur.2d Contracts, § 402 (1964).

The evidence demonstrates that TCID made no attempt to comply with the operating criteria issued by the Secretary on March 12, 1973. TCID has tried to avoid the consequences of its refusal to comply by contending that the operating criteria were invalid and unenforceable. The merits of these contentions have been considered and rejected. Our rationale is that the 1973 operating criteria must be shown to be void for TCID to sustain its position. This it cannot do. They clearly fall within the ambit of Secretarial power to prescribe rules and regulations under the 1926 contract.

This action poses a unique case procedurally and jurdically. We do not question the right of the Paiute Tribe to attack the 1972 operating criteria as arbitrary, capricious and an abuse of the Secretary's authority. The Tribe chose to do so

by action in the District Court for the District of Columbia, naming only The Secretary of Interior as a defendant. It chose not to name as defendants its true opponents, the Lahonton Project farmers represented by the TCID. The district court chose not to require the joinder of the TCID. The TCID chose not to intervene as a real party in interest. Thus, the action proceeded as an ex parte action in a substantial sense, the Secretary of Interior being pretty much in the position of a stakeholder. The final result was the promulgation of the 1973 operating criteria at the direction of the court. The Secretary was unquestionably subject to the jurisdiction of the court, and was in jeopardy of contempt if he disdained to comply. The Department of Justice refused to appeal.

There are portions of the District of Columbia decree which cause one to ponder. The opinion does not show that the finding that 288,120 acre feet diversion through the Truckee Canal would ultimately be adequate was any less of a "judgment call" than the 1972 allowed diversion of 378,000 acre feet. Also, it is not at all clear to this Court that the District of Columbia court's directive to the Secretary to invoke the sanctions of Article 32 of the 1926 contract (354 F.Supp. 265) was within the competence and authority of the judge.

Nevertheless, the position adopted by the TCID is even more difficult to understand. First, we note that before amended operating criteria were issued, the TCID notified the Secretary that it would not comply (354 F.Supp. 258). Such an attitude of complete defiance is incomprehensible.

In briefs both the Secretary and the Tribe assert that

the remedy that the TCID should have pursued was an action against the Secretary, presumably in the District of Nevada, attacking the validity of the 1973 operating criteria on the same grounds that it has asserted here defensively. In fact, in oral argument, the government attorney, Mr. McElroy, asserted: "This happens all the time." That may be so, but we have failed to find any reported precedent which parallels the procedural conflict which faces us here. This is not the normal case of rules and regulations promulgated in the implementation of a government contract in which only the rights and interests of the government and the other contracting party are at issue. Here, the administration of the Lahonton Project affects the rights of many parties other than the two contracting parties. It is juridically offensive to this Court to contemplate a situation where in February 1973 a federal district court has supervised the issuance of new operating criteria, and in April 1973 another district court is requested to invalidate them as arbitrary, capricious and in excess of authority. But this possibility seems to be acceptable in view of the defect in parties in the initial action.

Whatever one may think of such a situation, it is nonetheless clear that self-help to the extent to which TCID availed itself is not the remedy. It could not defy the regulations and after notification of contract termination defend upon the ground that if it had presented its case by intervention in the District of Columbia court or if it had prior to termination attacked the new regulations in a Nevada court, grounds for termination of the contract would not have existed.

In consideration of the premises,

IT HEREBY IS ORDERED that plaintiff take nothing by virtue of its complaint and it is hereby declared that the Secretary of Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to possession and control of the Newlands Reclamation Project effective as of November 1, 1974.

DATED August 17, 1983.

Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1/ There is no question that the defendants have raised the issue of sovereign immunity in their attack on this court's jurisdiction. It is not so clear, however, whether they are also contending that plaintiff's claim can only be brought in the Court of Claims because it is primarily a contract action against the United States involving a claim in excess of $10,000 which under the Tucker Act, 28 U.S.C. § 1491, lies within the exclusive jurisdiction of the Court of Claims. This argument is suggested at page 32 of defendants' post-trial brief.

Assuming that defendants have made this argument, the Tucker Act does not require that this case be brought in the Court of Claims. The Tucker Act applies only to claims for money damages. It is generally recognized that the Court of Claims' jurisdiction cannot be avoided by a complaint that appears to seek only equitable relief when the "real effort of the complaining party is to obtain money [in excess of $10,000] from the federal government" Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), quoting from Bakersfield City School District v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979). In the instant case, plaintiff has made no effort to seek monetary damages either expressly or impliedly. Its sole request is for declaratory and injunctive relief. If plaintiff's request should be granted, the outcome will not result in the equivalent of money damages. Therefore, it cannot be said that plaintiff's "real effort" is to obtain money from the federal government which would require this court to decline jurisdiction to hear the case. Finally, it should be noted that a district court does not lose jurisdiction over a claim for non-monetary relief simply because the claim may later be the basis for a money judgment. Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981).

2/ For a thorough analysis of this trend, see K. Kavis, Administrative Law Treatise, Chap. 27 (1st ed., Supp. 1982).

No. 82-1723

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. We submit that the Questions Presented by the Pyramid Lake Paiute Tribe of Indians are not presented by the record in this case. This is an action to quiet title to the use of the waters of the Carson River. The initial Question Presented insofar as the Tribe is concerned is whether a *non-party* who has no interest in or claim to the waters of the Carson River and whose rights to use the waters of the Truckee River cannot be impaired by the decision in this case has sufficient interest and standing to intervene and seek a writ of certiorari in this court to review that decision.

2. Was the district court correct in determining the Newlands Project water duty on the basis of beneficial use, that is, the amount of water reasonably and economically required to irrigate the crops, when some of the project farmers' water right applications set forth a lower water duty which had never been implemented or followed and which would not provide sufficient water to irrigate the crops throughout the irrigation season.

3. Whether the district court erred in providing in the Administrative Provisions of its decree that applications for changes in the place of diversion or manner or place of use of the waters rights in Nevada adjudicated therein, including the project farmers' water rights, were to be initially directed to the Nevada State Engineer for approval.

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Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

1. THE TRIBE'S STATUS AND PRIOR MOTIONS TO INTERVENE

At the onset it should be emphasized that the Pyramid Lake Paiute Tribe of Indians is not a party in this action, and that two prior attempts by the Tribe to intervene in this case have been rejected.

On March 4, 1968, the Pyramid Lake Paiute Tribe of Indians filed a Motion to Intervene as a Defendant, Counterclaimant and Crosscomplainant in the case. This motion was denied by the district court on January 3, 1969. Appendix G., Tribe's Petition at App. 107-112. That denial was affirmed by the Court of Appeals. Appendix H, Tribe's Appendix at App.113-122; *United States v. Alpine Land and Reservoir Company* 431 F.2d 763 (9th Cir. 1970);

rehearing denied 431 F.2d 763 (9th Cir. 1970); cert. denied 401 U.S. 912 (1971). Again, on February 12, 1983, after the time for the filing of petitions for rehearing had expired, the Pyramid Lake Paiute Tribe of Indians submitted to the Ninth Circuit Court of Appeals a Motion to Intervene or to Be Substituted as a Party for the United States and a proposed Petition for Rehearing and Suggestion for Rehearing in Banc. This motion was denied by the Court of Appeals on April 1, 1983. Appendix B., Tribe's Petition at App. 20. The Tribe did not seek this Court's review of that denial.

2. JURISDICTIONAL ISSUE

The judgment of the Ninth Circuit Court of Appeals was entered on January 24, 1983. By writ of certiorari granted upon the petition of a *party*, cases in the court of appeals may be reviewed by this Court pursuant to 28 U.S.C. § 1254(1). In this case, no petition for writ of certiorari was filed by any *party* within 90 days following the entry of the judgment of the Court of Appeals, and the order on mandate from that judgment has now been entered. See Appendix A attached hereto.

While in some unusual situations non-parties have been treated as parties and permitted to intervene and file a petition for writ of certiorari under 28 U.S.C. 1254(1), this is not the type of case in which such intervention has been allowed. *See generally* Stern & Gressman (5th ed.) *Supreme Court Practice* § 6.17 at 435-436 (1978) and cases cited. Here the action was not commenced on behalf of the Indians, they are not the real party in interest, and they claim no right to use the waters of the Carson River which are the subject of this quiet title suit. Under these

circumstances there is no basis to treat the Tribe as a party and no statutory jurisdiction for the Tribe's requested review of the decision of the Court of Appeals, which has been accepted by *all* of the parties to the case.

3. THE PROCEEDINGS BEFORE THE DISTRICT COURT

This is a quiet title suit which adjudicated the rights to use the waters of the Carson River in Nevada and California.

The complaint was filed by the United States on May 11, 1925. In brief, the United States alleged that it had a right to 5,000 cubic feet per second of the waters of the Carson River for its Newlands Project with a priority of July 2, 1902. The United States prayed for a decree quieting its rights and determining the relative rights of the defendants. *See* Complaint filed on May 11, 1925. The defendants, who were all the upstream users of the waters of the Carson River and its tributaries in Nevada and California, were served and the issues were joined.

There were two trials before the district court. The first trial commenced on April 16, 1929 and continued intermittently up to and including November 19, 1940. *See* page 17 of Plaintiff's Opening Brief filed on October 8, 1941. The second trial commenced on June 4, 1979.

In the 1929-1940 trial Truckee-Carson Irrigation District (hereinafter "TCID") did not represent the interest of the Newlands Project farmers and those farmers were not parties in the case. In the 1979 trial, however, TCID did represent the interests of the project farmers for in 1975 those farmers were joined as a class of defendants,

and TCID was ordered by the court to represent those class defendants in this case. *See* Order filed June 5, 1975.

Following the first trial and on March 19, 1941, the court appointed a Special Master to review the evidence and to make proposed findings of fact, conclusions of law and final decree to the court. *See* page 17 of Plaintiff's Opening Brief filed on October 8, 1941.

On June 28, 1951, the Special Master presented Proposed Findings of Fact, Conclusions of Law and Decree to the court and, on July 14, 1958, amendments thereto. *See* June 28, 1951 letter from John V. Mueller to the Honorable Roger T. Foley; Proposed Findings of Fact, Conclusions of Law and Decree filed on September 18, 1951; Amended Proposed Findings of Fact and Conclusions of Law and Decree filed on July 14, 1958. These Findings of Fact proposed an applied water duty of 5 acre-feet per acre for all lands on which the waters of the Carson River were used.

For about 15 years the action remained fairly dormant. On February 15, 1974, the court entered an order directing the parties to file their written objections to the Special Master's proposed Findings of Fact, Conclusions of Law and Decree. *See* Order To Show Cause filed on February 15, 1974. Objections to the Special Master's proposed Findings of Fact, Conclusions of Law and Decree were filed by the United States, TCID and most of the upstream defendants, and on June 4, 1979 the trial concerning those objections, and the other issues as stated in the Pretrial Order commenced.

There were ten days of trial. The great bulk of the testimony and exhibits at this trial concerned the proper water

duty, both for the project lands and for the lands above the Newlands Project.

On October 28, 1980, the district court filed its Opinion, Appendix F, Tribe Appendix at App. 69-107; *United States v. Alpine Land & Reservoir Co., et al.*, 503 F.Supp. 897 (D. Nev. 1980), and its Findings of Fact and Conclusions of Law. The district court determined that the Newlands Project water duty was 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands. For the lands above the Newlands Project it determined water duties which ranged from 4.5 acre-feet per acre to 9 acre-feet per acre. The Final Decree was formally entered on December 18, 1980. On February 12, 1981 the United States filed its Notice of Appeal.

4. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The opinion of the United States Court of Appeals, Ninth Circuit, was filed on January 24, 1983. Appendix A, Tribe's Petition at App. 1-19; *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983). The Court of Appeals affirmed the district court's judgment in all respects material to the instant petition. No petitions for rehearing were filed by any of the parties in the case.

5. ACTIVITIES SUBSEQUENT TO THE COURT OF APPEALS PROCEEDINGS

No petitions for certiorari were filed with this Court by any of the parties to the action.

On April 23 (Saturday), 1983, the Pyramid Lake Paiute Tribe of Indians' Petition for Leave to Intervene and Petition for Writ of Certiorari to the United States Court of

Appeals for the Ninth Circuit was docketed in this Court. A copy of that petition was received by counsel for Truckee-Carson Irrigation District on April 28, 1983. On May 3, 1983, the district court filed an Order on Mandate in the case. *See* Appendix A attached hereto.

6. A BRIEF DESCRIPTION OF THE NEWLANDS PROJECT

Under the Reclamation Act of June 17, 1902, the United States, on July 2, 1902, withdrew from public entry the lands in Nevada required for the government's first reclamation project, now known as the Newlands Project. Thereafter, the project was constructed and currently provides irrigation water to 73,002 acres of project lands. These lands and the water rights appurtenant thereto are owned by the project farmers. The Newlands Project draws water from two rivers, the Truckee and the Carson, both of which originate in the Sierra Nevada Mountains in California. On a long term basis, each river contributes about 50% of the project's water supply. The Truckee River is the major contributor in dry years and the Carson River is the major contributor in wet years. *See generally* 1979 RT Vol. VIII, pp. 846-848; 1979 Exhibit 39.

The project works include Derby Dam on the Truckee River (about 25 miles below Reno and 30 miles upstream from Pyramid Lake); the Truckee Canal, which is a 32.5 mile canal leading to Lahonton Reservoir; a small diversion dam on the Carson River and Lahonton Reservoir, which has a storage capacity of 317,280 acre feet. The waters of the Truckee River are diverted at Derby Dam into the Truckee Canal. Those waters are used to irrigate the project's 6,347.79 acre Truckee Division or are carried to La-

honton Reservoir. The waters of the Carson River are diverted to Lahonton Reservoir by the small diversion dam. The project's 66,654.21 acre Carson Division is irrigated by the commingled waters of the Truckee and Carson rivers that are released from Lahonton Reservoir. *See generally* 1979 RT, Vol. VIII pp. 812-813; 1979 Exhibits 32 and 35.

7. THE TRIBE HAS NO INTEREST IN THE WATERS OF THE CARSON RIVER AND THE DECISION OF THE COURT OF APPEALS DOES NOT ADVERSELY AFFECT THE TRIBE'S RIGHTS

The fundamental fact which the Tribe does not face up to is that this is a lawsuit to quiet title to the waters of the Carson River. Pyramid Lake and the Indian Reservation are not within the Carson River watershed. They are situated entirely within the Truckee River watershed, and the Tribe's claims of right to use water on the Reservation including its claims of right to use water for fish flows and at Pyramid Lake are directed to the waters of the Truckee River. None of the waters of the Carson River have ever been diverted to the Reservation, and the Tribe does not claim a right to use the waters of the Carson River on the Reservation, or at all. The Tribe thus cannot assert any legally cognizable interest in the waters of the Carson River.

The Tribe attempts to sidestep its lack of interest in the litigation by claiming that a Carson River water duty for the Newlands Project of 3.5 and 4.5 acre feet per acre rather than 3.0 acre feet per acre will result in the loss of Truckee River water which would otherwise flow to Pyramid Lake. This is not correct. In the first place, the project water duty applicable to the *Truckee River* was

adjudicated in the *Orr Ditch* case. *See United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. 1944). That water duty is 3.5 acre feet per acre for the bottomlands, and 4.5 acre feet per acre for the benchlands. 1979 Exhibit 53, pp. 10-11. A determination of a lesser water duty for the Carson River, not based on beneficial use, but on a water duty limitation in some of the old water right applications, would not and indeed could not affect the previously adjudicated 3.5 and 4.5 acre feet per acre water duty for the Truckee River which was fixed in the 1944 *Orr Ditch* final decree.[1]

In fact, a 3.0 acre feet acre water duty for the Carson River would only *increase* the project's Truckee River diversions. As the record in this case shows, the Newlands Project farmers' water duty has always been 3.5 acre feet per acre for the bottomlands, and 4.5 acre feet per acre for the benchlands. 1979 RT Vol. VIII, pp. 840-842. A 2.92 or 3.0 acre foot per acre water duty for the Newlands Project has never been implemented or followed. Not by the Watermaster, not by the Truckee-Carson Irrigation District, and not by the United States. Appendix A, Tribe Appendix at App. 9; 1979 RT Vol. V, pp. 475-476; 1979 RT Vol. VIII, pp. 840-842. As the record in this case amply shows, a 3.5 and 4.5 acre foot per acre water duty has consistently been utilized, the water drawn in approximately equal proportion from both Carson River and Truckee River waters. 1979 RT, Vol. VIII, p. 848; 1979 Exhibit 39. If the

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[1]The water duty determined for project lands in *Orr Ditch* is not among the issues which could be affected by the pending case of *Nevada v. United States of America* No. 81-2245 or the consolidated cases of *Truckee-Carson Irrigation District v. United States of America* No. 81-2276 and *Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District* No. 82-38.

water from the Carson River were limited to the 3.0 acre foot per acre water duty urged by the Tribe, the Newlands Project would have to take more water from the Truckee River in order to satisfy the reasonable and beneficial water duty of 3.5 and 4.5 acre feet per acre adjudicated in *Orr Ditch*. A reduction in the project's *Carson River water duty* from 3.5 and 4.5 acre feet per acre to 3.0 acre feet per acre could thus only result in *increased Truckee River diversions* to the project. That would deprive Pyramid Lake of water that it has been currently receiving, a result which no one desires.

Finally, if the Tribe does have a *right* to use Truckee River water for Pyramid Lake, the project's water duty is of no relevance at all. Obviously, if the Tribe eventually wins *United States v. Truckee-Carson Irrigation District,* 649 F.2d 1286 (9th Cir. 1981), *modified,* 666 F.2d 351 (1982), *cert. granted sub. nos.* 81-2245, 81-2276 and 82-38 (1982), and it is determined that the Tribe has a reserved water right with an 1859 priority to the waters of the Truckee River for Pyramid Lake, that right would have to be satisfied before *any* water could be diverted from the Truckee River to the reclamation project, for the project's water right under the 1944 Final Decree in the *Orr Ditch* case has a 1902 priority.

In brief, the rights of the Pyramid Lake Indians to use the waters of the Truckee River for Pyramid Lake cannot be impaired by this case. The decision of the Ninth Circuit Court of Appeals will not take water from Pyramid Lake. The Indians' claims are to the waters of the Truckee River. Nothing that has been decided in this case can possibly affect those claims. The Indians have no rights to protect in this case and intervention is improper.

8. THE LOWER COURT'S DETERMINATION OF THE NEWLANDS PROJECT WATER DUTY WAS IN ALL RESPECTS PROPER

Many of Tribe's evidentiary statements (at pages 18-26) are not only unsupported by the record but are often contradicted by the evidence that was received. The evidence that was introduced in the trial of this case as to project water duty is as follows:

In the 1929-1940 trial, the government called two witnesses who testified as to project water duty. The first, Alfred W. Walker, was the then Project Manager who had substantial experience with reclamation projects and irrigation, including soils classification. 1929 RT, Vol. 1, p. 220. He recommended in his testimony a water duty for the project lands of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands. 1929 RT, Vol. 1, pp. 235-236, 1929 RT, Vol. 2, p. 334.

The second, Professor S. T. Harding, relied primarily on a 1909 soils classification study for his testimony that the *average* water duty for 80,000 acres in the north and south units of the Carson Division of the Newlands Project was 2.92 acre-feet per acre. 1929 RT, Vol. 3, pp. 660-669. However, Mr. Harding recommended specific project water duties ranging up to 4 acre-feet per acre for ten different types of soils. *See* 1929 RT, Vol. 3, pp. 661-669.[2]

In sum, *both government witnesses* at the earlier trial recommended water duties in excess of 3 acre-feet per acre for project lands. One recommended 3.5 and 4.5 acre-feet

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[2]These water duties are also shown on Mr. Harding's exihibit which was received in evidence as Plaintiff's Exhibit No. 14. *See* 1929 RT, Vol. 3, p. 669; Tables 1 and 2 of 1929 (Plaintiff's) Ex. No. 14.

per acre. The other recommended from 2.5 acre-feet per acre to 4 acre-feet per acre.

In the 1979 trial, TCID's evidence of project water duty ranged from 3.5 acre feet per acre for the bottomlands and 4.5 acre feet per acre for the benchlands to 5.7 acre feet per acre for all the project lands. The government's evidence, when corrected to reflect field conditions and current crop yields, supported a project water duty consistent with TCID's evidence, as the Ninth Circuit specifically pointed out in its opinion. Exhibit A, Tribe's Appendix at App. 11-12; Exhibit F, Tribe's Appendix at App. 93.[3]

Significantly, the project water duty determined by the Special Master after trial and later incorporated into the consent decree in the *Orr Ditch* case was also 3.5 and 4.5 acre feet per acre. 1979 Exhibit 53, pp. 10-11.

Finally, neither the United States, nor the Tribe as amicus, argued on appeal to the Ninth Circuit that the district court clearly erred in its factual determination of water duty required for beneficial use. Because both lower courts considered the effect of the water service contracts and considered (and rejected) allegations of waste and inefficiency in arriving at their determination of this factual issue, no further review is warranted by this Court.

The Tribe contends that the Ninth Circuit Court of Appeals erred in refusing to accord controlling effect to the 3.0 acre foot per acre water duties specified in some water

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[3]In fact, with these adjustments the United States' evidence reflected a project water duty of 3.97 acre feet per acre which is slightly *higher* than the overall project water duty of 3.71 acre feet per acre that results from the 3.5 and 4.5 acre feet per acre determination. 1979 Exhibit 41.

service contracts between project landowners and the United States, either as controlling contractual provisions or as "administrative determinations."

Section 8 of the Reclamation Act, which this Court has termed "a restraint on the Secretary", *California v. United States,* 438 U.S. 645, 678 n.31 (1978), provides that "beneficial use shall be . . . the measure . . . of the right . . .", 32 Stat. 388, 43 USC 372. Every court which has considered the issue has refused to permit the Secretary to impose contractually any more restrictive measure. *See Ickes v. Fox,* 300 U.S. 82 (1937), *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir. 1943), *Lawrence v. Southard,* 192 Wash. 287, 73 P.2d 722 (1937).[4] In accordance with this body of law, the Ninth Circuit held that beneficial use was the sole and controlling measure of the Newlands project water rights, notwithstanding the reference to specific water duties contained in some of the water service contracts.

The Ninth Circuit further held that because of the lack of uniformity among the contracts on the subject of water duty, as well as the lack of enforcement of any water duties contained therein, the water service contracts could not be given any weight as "administrative determinations" of the amount of water necessary for beneficial use. In the Tribe's view, in refusing to accord them such weight, the judiciary "usurps far too much of the authority granted the Secretary to resolve these [beneficial use] matters." Tribe's Petition at 23.

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[4]In *Ickes v. Fox,* this Court denied rehearing despite the United States' acknowledgment that the Court's decision "gives applicants, on the sole basis of prior deliveries of water, a vested right in a larger amount of water than was stipulated in their contracts." *Ickes v. Fox,* 300 U.S. 640 (1937), *see* also *Fox v. Ickes,* 137 F.2d 30, 33. (D.C. Cir. 1943).

The Tribe's view of the project contracts as *ipso facto* administrative determinations of beneficial use, insulated from court review, must be rejected for two reasons. First, to adopt its view would strip the courts of virtually all power to review water duty limitations set by the Secretary, a jurisdictional limit which is clearly inappropriate, given the clear standard established by Section 8 for measuring such rights.[5]

Second, and more importantly, the court below did not hold that the Secretary may not administratively determine beneficial use, nor that if he did so the courts would be free to disregard such a determination. Instead it held that "*in the absence of* any earlier administrative or judicial determination of beneficial use," the court was free to make a *de novo* determination of the factual issue based on current information. Appendix A, Tribe's Appendix at App. 8, emphasis added.

The courts below were clearly correct in disregarding the contracts as constituting any sort of expression of agency determination of the amount of water needed for beneficial use. There is no evidence that the figures were the result of

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[5]The 3.0 acre foot per acre water duty contended by the Tribe would not survive even the limited judicial review it urges. Its inclusion in some contracts and omission from others was clearly arbitrary and capricious. Further, it was not the product of any factual investigation concerning water duties but was included in contracts without consideration of soil type or crop patterns or any other relevant factors. Finally, the evidence shows that a 3 acre foot per acre water duty would not provide even enough water to satisfy the crop *consumptive use*, excluding conveyance losses and regardless of conservation efforts. Appendix F, Tribe's Appendix at App. 93-94. Thus, the Tribe's contention that there is no evidence that a 3.0 acre foot per acre limitation would be arbitrary, capricious and an abuse of discretion is just plain wrong.

any fact-finding endeavor by the government. Most of the contracts contain no reference to water duty at all, but merely provide for beneficial use as the limit of the project water right. *See* 1979 Ex. No. 38, Agreements of Larson, Hardy, Smith and Merritt. Moreover, of the two types of agreements which do mention a specific water duty, only one even purports to limit the amount of the project right. *See* 1979 Ex. No. 38, Christensen Agreement. The other merely defines the amount of water the United States will deliver *without charge*. *See* 1979 Ex. No. 38, Leet Agreement.

Furthermore, any specific water duties contained in the contracts were rendered meaningless by the contract modifications resulting from the execution by the United States and TCID in 1926 of the agreement for TCID's management and operation of the Newlands Project. As part of that 1926 agreement, project landowners were required to execute a document formally consenting to its terms. The consent expressly provided that the 1926 contract would "constitute a modification of the landowners' contract relations with the United States." 1979 Ex. No. 7. In turn, the 1926 contract expressly provided that the project lands "shall have a prior right to the economical and beneficial use of all such waters [of the Truckee and Carson Rivers] *in sufficient quantity to properly irrigate* 87,500 acres of land." 1979 Ex. No. 7, Art. 35; emphasis added.

Finally, the uncontradicted testimony in this case was that water deliveries have never been restricted to 3 acre feet per acre, even when the United States operated the project. 1979 RT, Vol. VIII, p. 841. Indeed, the Secretary stipulated to a higher water duty for the same project lands in the case of *United States v. Orr Water Ditch Company*. 1979 Ex. No. 53.

Such lack of uniform policy, lack of implementation or enforcement, and nearly contemporaneous adoption of another, inconsistent, water duty limitation for the *same lands* clearly negates any inference that the contract amounts were intended by the Secretary to be an "official" determination of beneficial use. The courts below were correct in so finding.

The offhanded manner in which the water duty figures were arrived at and the haphazard manner of their inclusion "in scattered contracts" on the Newlands project demonstrates the unwisdom of the rule of complete judicial deference to such figures which is urged by the Tribe.

In support of its petition, the Tribe has contended that the decision below should be reviewed and reversed because (1) it would create confusion and uncertainty in water rights by casting doubt on the validity of limits contained in reclamation water right contracts, and (2) because it overlooks this Court's emphasis on water conservation as a strong public policy.

It is highly unlikely that any uncertainty or confusion will be created as a result of the Ninth Circuit's decision. Reclamation rights will continue to be subject to the limitation of beneficial use, the same limit the Tribe contends is embodied in reclamation contract provisions. TCID is unaware of any other project in which water deliveries or entitlements are being restricted below the amount which project users claim necessary for beneficial use, nor has the Tribe cited any.[6] The Ninth Circuit's opinion is in full ac-

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[6]*Westlands Water District v. United States,* 700 F.2d 561 (9th Cir. 1983), cited by the Tribe, does not involve the issue of beneficial use or water duty on project lands, and there were no contracts between landowners and the United States in that case.

cord with existing statutory and case law and has no substantial impact on existing water rights which would warrant further consideration by this Court.

Petitioner's argument that the Ninth Circuit's decision inadequately considers water conservation is simply wrong. The Ninth Circuit opinion expressly recognized that waste, including unreasonable conveyance losses and use of cost ineffective methods, and consideration of competing alternative uses of the water must be taken into account in determining beneficial use. It specifically found that the district court "made no legal error in defining beneficial use", Appendix A, Tribe's Appendix at App. 13, and noted that neither the United States nor the Tribe had argued on appeal that the district court's findings of fact were clearly erroneous. Appendix A, Tribe's Appendix at App. 12.

The court went further, however, and examined the evidence below on the issue of reasonable beneficial use and found that "the evidence presented by the United States was in broad agreement with that presented by TCID", Appendix A, Tribe's Appendix at App. 11-12, and that the evidence below indicated "that a reduction to the 3.0 acre foot per acre water duty sought after by the United States would drastically reduce the farmers' yields over the long term." *Id.* Thus, the courts below both apparently found that reduction of water duty to the 3 acre feet per acre argued by the Tribe would constitute not "water conservation", but a substantial loss of water rights which could

not be compensated for by increased agricultural efficiencies. This court should not grant certiorari merely to review the lower court's factual determination of the unavailability of water conservation savings.

9. THE COURTS BELOW ACTED PROPERLY IN PROVIDING THAT APPLICATIONS FOR CHANGE IN PLACE OF DIVERSION OR MANNER OR PLACE OF USE OF PROJECT WATER RIGHTS SHALL BE INITIALLY SUBMITTED TO THE NEVADA STATE ENGINEER

In the Administrative Provisions of the decree, the district court provided that application for change in place of diversion, or manner or place of use of all the adjudicated rights in Nevada should be initially directed to the Nevada State Engineer. The decree then provides that any dissatisfied party can challenge the Nevada State Engineer's decision in the federal district court in Nevada.

The Ninth Circuit Court of Appeals upheld this procedure noting that the United States was not concerned with routine change applications of project water rights and that the state procedures with the right of review in the district court provide ample safeguards to assure that "admitted federal interests in the federal reclamation project" are protected. Appendix A, Tribe's Petition at App. 13-15.

The Tribe challenges these provisions contending that it has an interest in prohibiting changes which enlarge

project uses, and that the Secretary of the Interior should monitor changes in place and manner of use of project water rights. Tribe's Petition at 27. Addressing the last point first, the Secretary will receive notice of all change applications regarding project water rights and is privileged to present his views to the Nevada State Engineer in the initial proceeding, and then to the district court if he chooses. There is just no reason to assume that legitimate federal interests will not be fully protected under the change application procedure established by the district court. Secondly, the Tribe's concern that change applications will enlarge project uses is ill conceived. The only purpose of the district court's determination of consumptive irrigation water use (2.99 acre feet per acre for the project lands and 2.5 acre feet per acre for the lands above the project) was to assure that any change in place of diversion or manner or place of use would *not* enlarge the water use. Appendix F, Tribe's Appendix at App. 105. Bluntly stated, no application for change in place of diversion or manner or place of use could enlarge the former water use.

The government did not challenge in this appeal the district court's determination that the water rights on the Newlands Project are appurtenant to the land irrigated, *that those water rights are owned by the individual farmers*, and that the United States' interest is only that of a lien holder to secure repayment of project construction costs. Appendix F, Tribe's Appendix at App. 71. The type of change applications that are usually submitted by the project farmers concern changes in point of diversion on project lands or changes in place of use to other project lands. These types of changes do not impinge any con-

ceivable congressional directive and they have no effect at all on the government's lien, for in almost all instances the farmer has already paid in full the project construction costs allocated to his project land. 1979 RT, Vol. VIII, pp. 860-861. If a project farmer seeks to change the point of diversion of his project water right on his project lands or seeks to change the place of use of his project water right to other project lands, why shouldn't the application be submitted initially to the Nevada State Engineer for approval?

Most applications for changes in place of diversion, place of use or manner of use of water are relatively routine and non-controversial and can be expeditiously processed by the state official charged with such responsibility under state law. This, we submit, is consistent with the provisions of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, which provide that the Secretary, in carrying out the provisions of the Reclamation Act, "shall proceed in conformity" with the laws of the State. *See also California v. United States,* 438 U.S. 645 (1978).

If a case does arise where the Nevada State Engineer approves a change application which violates an express congressional directive in the Reclamation Act, the United States (and TCID) could have that decision immediately reviewed by the district court and presumably corrected.

We submit that in an overall quiet title water right suit where the court has appointed a Watermaster to administer its decree and has retained continuing jurisdiction of the case, it is preferable to have all change applications processed uniformly. No prejudice to the United States has or will result from that procedure.

CONCLUSION

The Tribe, a non-party, has no interest in the waters of the Carson River, the subject of this quiet title action. The project farmers' water duty was correctly determined by the courts below. The procedure established by the district court and upheld by the Court of Appeals for processing applications for changes in manner and place of use is consistent with Section 8 of the Reclamation Act of 1902, and all legitimate federal interests will be recognized and protected under that procedure. Thus, the Tribe's petition for leave to intervene and for a writ of certiorari is without merit. We respectfully urge that the petition filed by the Tribe be denied.

Respectfully submitted,

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Appendix A

CASE NO. CV-D-183-BRT

In the United States District Court
For the District of Nevada

United States of America,
Plaintiff/Appellant

vs.

Alpine Land & Reservoir Co., et al.,
Defendant/Appellee.

FILED: May 3, 1983
Clerk, U.S. District Court
District of Nevada

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on January 24, 1983 issued its mandate Affirming as Modified the District Court Judgment, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS

ORDERED that the mandate be spread upon the records of this Court.

IT IS FURTHER ORDERED .....

.....

.....

Dated this 3rd day of May, 1983.

/s/ BRUCE R. THOMPSON
United States District Judge

No. 82-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATE OF NEVADA'S BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

We submit that the questions presented by the petitioner would be more properly phrased as follows:

I. Should an Indian tribe be granted intervention for the first time in this Court for purposes of petitioning for a writ of certiorari when: (a) the Tribe claims no property right in the quiet title action for itself, (b) intervention has been twice denied by the lower courts at two separate stages of the proceedings below, (c) the United States, trustee for the Tribe, has declined to seek a writ of certiorari on behalf of the real party in interest, and (d) the substantive questions for which review is sought deal not with any point of Indian law, but rather with questions relating to non-Indian water rights on a federal reclamation project?

II. Should the concurrent findings of fact of both courts below that, under Section 8 of the Reclamation Act, actual beneficial use is the basis and measure of the project water rights, be overturned on the basis of inconsistently administered reclamation project water contracts?

III. Whether both courts below erred in finding that the Nevada State Engineer has primary administrative jurisdiction to approve changes in the use to which water will be put on a federal reclamation project when: (a) there is no specific federal statute governing modifications, (b) the United States will receive notice of each application for a change, (c) the United States may participate in the proceedings, and (d) the Federal District Court has reserved jurisdiction for purposes of review?

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IN THE

Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATE OF NEVADA'S BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This virtually-comprehensive water rights suit was brought by the United States in 1925 to quiet title to all water rights to the Carson River. It is believed to be the oldest active case pending in the federal courts. The United States is not seeking to quiet title to any Indian water rights, because there are no such claims on the Carson River.[1] The United States brought the action to

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[1] The Pyramid Lake Paiute Tribe claims no rights to the use of the Carson River. Likewise, Carson River water for the cutthroat trout and the cui-ui has never been an issue in this case.

secure water rights for the Newlands Reclamation Project, which also utilizes Truckee River water rights.[2]

The majority of Newlands Project farmers obtained their water rights by purchase thereof from the United States. The purchase contracts took many forms, some of which purported to limit the duty of water to 3 acre feet per acre ("afa"), while many others contained no specific amount limitation. As noted by the Court of Appeals, there has been no consistent administrative determination that 3 afa was the proper water duty for the Newlands Project. Pet. App. 9.

The case was tried before a Special Master between 1929 and 1940. The District Court entered a preliminary determination and temporary restraining order on March 24, 1950, decreeing a 2.92 afa duty for the Newlands Project. The order specifically provided that it was entered "without prejudice to any water claimants' rights to be determined upon the final adjudication herein." The 2.92 afa limitation, however, was not actually utilized. In 1958 the Special Master filed an amended report and a proposed final decree which generally called for a 5.0 afa water duty.

Ten years later (and 43 years after the filing of the complaint), in March 1968, the Tribe moved to intervene in the District Court. The court denied the Tribe's motion on the grounds that the Tribe had no interest in the waters of the Carson River, the motion was untimely, and the Tribe's interest in the Truckee River was adequately represented by the United States. The Ninth Circuit upheld this ruling, and this Court denied certiorari. *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763, *rehearing denied*, 431 F.2d 763 (9th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

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[2] *See Nevada* v. *United States*, Nos. 81-2245, 81-2276 & 82-38, now pending before the Court.

On February 15, 1974, the District Court entered an order to show cause, directing all parties in interest to appear and demonstrate why the proposed findings of fact, conclusions of law, and decree of September 18, 1951, as modified on July 14, 1958, should not be adopted and approved as the basis for the final decree. The court noted that the reports of the Special Master comprised an appropriate foundation for further proceedings. Finally, the court also noted that "under the circumstances, it is appropriate that we should start anew in an effort to resolve inequities, illegalities and discrepancies, if any, in the reports of the special master to the end that the use of the waters of the Carson River and its tributaries shall be finally adjudicated and determined."

The pretrial order, agreed to by the United States and the Truckee-Carson Irrigation District ("TCID") provided in part:

> The United States challenges the 5 acre feet per acre duty determined by the special master on the grounds that it is not consistent with the evidence presented. The United States intends to present additional evidence regarding the appropriate water duty, but has not yet reached its final conclusions as to the proper duty.

Thus it is clear, despite the contentions of petitioner, that an evidentiary hearing on the proper duty of water for the Newlands Project was specifically contemplated and sought by the United States.[3]

The District Court rendered its opinion on October 28, 1980. The water duty for the Newlands Project was ad-

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[3] Though the United States indicated in the pretrial order that it intended to make legal arguments that might affect the water duty, it never contended that the court should not hear the evidence that was ultimately received as to the actual beneficial use of water for the project lands.

judged to be 3.5 afa for bottom lands and 4.5 afa for bench lands. These duties, based on evidence pertaining to the use of Carson River water, were identical to the amounts fixed by the *Orr Ditch* court for Truckee River water utilized on the Newlands Project. *United States* v. *Orr Water Ditch Co.*, Equity A-3 (D. Nev. 1944); *see Nevada* v. *United States*, Nos. 81-2245, 81-2276 & 82-38, pending before this Court.

The court also ruled that any application to change the place of diversion, manner of use, or place of use of Carson River water in Nevada must be filed with and approved by the Nevada State Engineer, and that any party aggrieved by his determination could petition the District Court, which retained jurisdiction over the case for that purpose. The court further found that there was no "specific congressional directive" that would vest the Secretary of Interior with the jurisdiction to handle change applications for the Newlands Project. Pet. App. 82-83. Accordingly, all Nevada Carson River water rights were determined to be subject to the same modification procedures.

On an appeal by the United States, the Court of Appeals unanimously upheld both of these rulings.

Petitioner appeared as *amicus curiae* before the Court of Appeals, sharing the time of the United States at oral argument, and raised the same substantive arguments made here. Subsequent to the decision of the Ninth Circuit panel, the Tribe, upon learning that the United States did not intend to seek further review, moved the Court of Appeals to intervene in the case or, in the alternative, to substitute for the United States as plaintiff for the purpose of seeking rehearing. On April 1, 1983, the Court of Appeals denied the motion. Pet. App. 20. No party below has filed for a writ of certiorari or sought an extension of time to do so. On May 3, 1983, the District Court entered the mandate.

REASONS FOR DENYING THE WRIT

1. *Applicant Has Failed To Make The Extraordinary Showing Necessary To Justify Intervention In This Court.*

Applicant put forth its interest—indirect at best—in the Carson River adjudication when it attempted to intervene in 1968. Pet. App. 107-112. The District Court's denial of the Tribe's motion was affirmed by the Court of Appeals, rehearing was denied, and this Court denied the Tribe's petition for a writ of certiorari. Pet. App. 107; 401 U.S. 909. Fifteen years later, the Tribe again attempted to intervene, asserting an argument similar to the one made here, when it attempted post-decision intervention in the Ninth Circuit. Significantly, *the Tribe has not sought review of the Ninth Circuit ruling denying intervention.* Pet. App. 20. Instead, applicant is seeking to intervene in this Court independent of the proceedings below.

It must be noted that applicant has not claimed that its oblique interest in the Carson River was inadequately represented below. There is no claim that the United States failed to make any argument or take any position contrary to the applicant's wishes or interests.[4] Pet. 16. Applicant was granted leave to file an *amicus* brief in the Ninth Circuit, and shared oral argument with the United States.[5]

The Tribe has sought intervention in this Court simply because the Solicitor General, exercising his statutory discretion, decided not to petition this Court for a writ of certiorari. Pet. App. 15. *See* 28 U.S.C. § 518. In so doing, the Tribe has not presented any issue related to

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[4] The Justice Department attorney who acted as lead counsel in the 1979 hearing before the District Court has been engaged by the petitioner as counsel of record herein. Said counsel also appeared on the brief of the United States in the Court of Appeals.

[5] Therefore, the Tribe cannot satisfy the requirements identified in *Arizona* v. *California*, 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983).

Indian law. Both of the substantive questions in its petition relate to the Reclamation Act of 1902 and to the administrative jurisdiction of the Secretary of Interior. Whether these issues are appropriate for review by this Court is properly the province of the Solicitor General and the United States, not a non-federal amicus below.[6]

The only new matter the Tribe has offered in support of its motion is the decision in *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973). But the Tribe is incorrect in asserting that the consequences of that case provide an issue different from those already decided by the prior orders denying intervention.[7]

Applicant concedes, quite candidly, that the heart of its interest in this case is the possibility of having the outcome of the *Morton* case become moot. Pet. 12. Though the *Morton* court did not rule on water duties, it considered the 2.92 afa water duty established in the temporary decree in this case as part of the basis of its decision. The Newlands Project farmers were not parties to that case, so that no evidence was received by the *Morton* court from the real parties in interest as to the proper duty to be utilized for the Newlands Project.

Moreover, the *Morton* court specifically recognized that the *Alpine* case would ultimately determine the final, appropriate water duty for the Newlands Project:

> The parties and this Court of course recognize that neither the Secretary nor this Court can adopt or require a regulation that would infringe upon these [*Orr Ditch* or *Alpine*] decrees * * *. [Pet. App. 33.]

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[6] Indeed, we question the Tribe's standing to assert these matters. *See Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) (State does not have standing to enforce its citizens' federal constitutional rights against the United States); *see also Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 102 S. Ct. 3260, 3270 n.16 (1983).

[7] This contention was not accepted by the Court of Appeals when it denied post-decision intervention in this action.

Thus, applicant has known since 1973 that the outcome of *Alpine* would directly impact on *Morton*, yet it sought no appeal from *Morton* on that point, and failed to seek timely intervention in this case in light of the *Morton* decision under the "new development" theory now advanced here.

Accordingly, applicant should not be granted leave to intervene at this late post-decision stage, because it has, at best, only a tangential interest in this action, and because it either by-passed other opportunities in this case and in *Morton* or was turned down by the courts below.

2. *Petitioner Is Seeking Review Of A Factual Finding Made Concurrently By Both Courts Below.*[8]

As the Court of Appeals observed, the beneficial use controversy here is essentially a question of fact. Pet. App. 11. The Court of Appeals specifically held that the District Court's finding of fact that 3.5 afa and 4.5 afa were the proper water duties for the Newlands Project was supported by substantial evidence and that such duties were measured by beneficial use in accordance with Section 8 of the Reclamation Act. Pet. App. 13.

No one has ever challenged the correctness of these findings. Rather than attempt to attack the District Court's finding of fact as clearly erroneous, the United States and the petitioner unsuccessfully took a different tack on appeal. Pet. App. 12.

First, the Government argued that Nevada's Cooperative Act of 1903 (Nev. Stats., Chap. IV, Sec. 2) limits water duty at the Newlands Project to 3 afa.[9] The Court of Appeals rejected that argument, and no review is

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[8] These comments need be considered only in the event that the Court grants the Tribe's motion to intervene.

[9] Nevada repealed this Statute in 1905, Nev. Stats., Chap. XLVI, Sec. 1. Subsequent enactments limited the water duty not to an arbitrary figure, but to beneficial use. *See* NRS 533.035.

sought of the determination of both courts below that this Nevada statute is wholly inaplicable to the water duty determination.

Second, the Government argued below that, to the extent that there were contracts with a 3 afa limitation, those contracts should override the evidence as to the actual, beneficial use for those project lands. The Court of Appeals rejected that argument as well. Petitioner now seeks review of this conclusion, claiming that it is an important issue. Petitioner does not argue that there is any conflict in the Circuits. Indeed, the Ninth Circuit's interpretation of these contracts is fully consistent with the interpretation given to similar contracts by the District of Columbia Circuit. *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), *cert. denied*, 320 U.S. 792 (1943). Nor does petitioner contend that reliance on the Reclamation Act in the face of inconsistently-applied administrative determinations conflicts with any decision of this Court. To the contrary, the Court of Appeals specifically relied on *California* v. *United States*, 438 U.S. 645, 678 n.31 (1978), in ruling that Section 8 of the Reclamation Act, mandating a beneficial use standard, is a "specific congressional directive" which acts as a "restraint upon the Secretary." Pet. App. 7.

Petitioner argues, citing *Sporhase* v. *Nebraska*, 102 S. Ct. 3456 (1982), and *Colorado* v. *New Mexico*, 103 S. Ct. 539 (1982), that the decisions below are inconsistent with this Court's efforts to encourage water conservation. The Court of Appeals, however, specifically focused on the possibility of waste when analyzing the evidence before and the reasoning of the District Court. Pet. App. 5-6. The Court of Appeals, furthermore, specifically based its ruling on the evidence in the record that there was no waste or inefficiency on the Newlands Project, and that the reduction to the 3 afa water duty sought by the United States would drastically reduce the farmers' yields over the long term. Pet. App. 12. That factual finding does not merit further review.

The rulings below were eminently correct and consistent with the well-established authority that beneficial use (exclusive of waste) is the proper measure and basis of a water right duty. If the United States had an objection to a *de novo* hearing to consider evidence of beneficial use, it was waived by its failure to object or preserve the issue on appeal.

3. *Both Courts Below Were Correct In Recognizing That The Nevada State Engineer Has Primary Administrative Jurisdiction To Approve Or Reject Proposed Changes In The Use Of Decreed Water Rights.*

The District Court reviewed Nevada's comprehensive scheme of water rights regulation. *See* Pet. App. 104. NRS 533.325 requires any appropriator who wishes to change the point of diversion, manner of use, or place of use of water already appropriated to apply to the State Engineer for a permit for any such change. NRS 533.345 through 533.365 provide for modification applications and their contents, notice and protest procedures, and other administrative details. The State Engineer's duties and responsibilities in approving or rejecting applications are well detailed in NRS 533.370.

The District Court held that the Nevada statutory procedures control for all Nevada water rights for which a change is sought. The court, however, relying on the Nevada statutes, specifically reserved the power to review decisions by the State Engineer. Pet. App. 105; *see* NRS 533.450.

The United States appealed this ruling only insofar as it related to changes on the Newlands Project. The United States did not appeal the District Court's ruling as to the general applicability of this procedure to the Nevada rights in the *Alpine* decree. The basis for the Government's appeal was its concern that the State Engineer may not give proper weight to federal interests.

That argument was properly rejected by the Court of Appeals. Pet. App. 13-15. The Court of Appeals found that the notice and protest procedures of Nevada law are adequate to explore and protect all federal issues and interests, if and when they arise. The Court of Appeals also based its ruling on *California* v. *United States, supra*, which had held that state law will control the distribution of water rights absent a preempting federal directive. The Court of Appeals agreed with the District Court that

> the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, compels the conclusion that Congress intended the transfers to be subject to state water law. [Pet. App. 14.]

Petitioner has not identified any specific statutory authority either permitting or requiring the Secretary of Interior to assert administrative jurisdiction over reclamation project change applications. The citation of statutes providing general regulatory authority falls far short of the "specific congressional directive" envisioned by *California* v. *United States* in respect to change procedures. *See* 43 U.S.C. §§ 373, 440. Moreover, as a matter of policy, it is far more desirable to have all decreed water rights within a State subject to the same modification procedures. The Nevada State Engineer, under a comprehensive statutory scheme, has a staff of experienced engineers with extensive expertise in processing these applications and following the appropriate procedures. The United States will receive notice of each application and may participate in any proceedings. NRS 533.110, 533.130. The State Engineer is bound to follow all applicable federal law. In addition, the decree provides for the review of modification rulings by the District Court. Federal interests in the operation of the reclamation project are therefore fully protected.

There is no contention that there is a conflict among the Circuits on this issue or any other issue in the case.

The points raised by petitioner are peculiar to this case and unlikely to recur. And, finally, we respectfully submit that the courts below correctly applied the law and, in particular, *California* v. *United States*. Further review is therefore unwarranted.

CONCLUSION

For the foregoing reasons, the application to intervene and the petition should be denied.

Respectfully submitted,

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No. 82-1723

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT,
STATE OF NEVADA, UNITED STATES
OF AMERICA, et al.,
Respondents.

STATEMENT OF RESPONDENT SIERRA PACIFIC POWER COMPANY IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT

The Pyramid Lake Paiute Tribe has stated in its petition that it does not intend by its petition to affect the "large number of upstream users." Sierra Pacific Power Company, as one of those users, is concerned with the comprehensive management of the river by one entity, the Nevada State Engineer. Accordingly, Sierra Pacific Power Company opposes the Tribe's petition for intervention and petition for

certiorari and adopts the statement of the Respondent State of Nevada in opposition to the Tribe's petitions.

Respectfully submitted,

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No. 82-1723

In the Supreme Court of the United States

OCTOBER TERM, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.

ON PETITION FOR LEAVE TO INTERVENE AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN RESPONSE TO THE PETITION TO INTERVENE AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the present circumstances, the Court should grant the petition of the Pyramid Lake Paiute Tribe of Indians to intervene in this case.

2. Whether owners of more than 42,000 acres of land on the Newlands Reclamation Project in Nevada are bound by the express provisions in their water right contracts with the United States limiting to 3.0 acre feet per acre the amount of Project water to be furnished to their lands each year.

3. Whether the district court correctly ordered that applications for changes in the place of diversion or manner or place of use of Newlands Project water must be submitted to the State Engineer for approval.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 697 F.2d 851. The opinion of the district court (Pet. App. 69-107) is reported at 503 F. Supp. 877.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On February 14, 1983, petitioner, which had participated amicus curiae in the case, moved in the court of appeals for leave to intervene or, in the alternative, to be substituted for the

United States as appellant. This motion was accompanied by a petition for rehearing with suggestion for rehearing en banc. On April 1, 1983, the court of appeals denied the motion for intervention or substitution of parties (Pet. App. 20) and, as a result, it had no occasion to rule on the petition for rehearing. The petitions for intervention and for a writ of certiorari were filed in this Court on April 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Pyramid Lake Paiute Tribe of Indians, petitioner herein, occupies the Pyramid Lake Reservation in northwestern Nevada. Pyramid Lake, entirely within the Reservation, is the downstream terminus of the Truckee River. A substantial volume of Truckee River water never reaches Pyramid Lake, however, because it is diverted at Derby Dam on the Truckee River and transported through the Truckee Canal to Lahontan Reservoir on the Carson River. There, the diverted Truckee River water is commingled with water from the Carson River for distribution to irrigated farmlands within the Newlands Reclamation Project.[1] See *Nevada* v. *United States*, No. 81-2254 (June 24, 1983), slip op. 2-4, 7-8 n.7. This Court's recent decision in *Nevada* v. *United States* and the earlier *Orr Ditch* case (*United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944)) concerned rights to the waters of the Truckee River. The instant case is a comprehen-

[1] Relatively small distributions of Truckee water are made from the Truckee Canal to approximately 6,348 acres of land within the Truckee Division of the Newlands Project before the Canal empties into Lahontan Reservoir. TCID Br. in Opp. 6.

sive adjudication of rights to the waters of the Carson River.

1. The United States established rights to appropriate water from the Carson and Truckee Rivers for use on the Newlands Project with a priority date of 1902 or earlier. Pet. App. 85-87 [2]; *Nevada* v. *United States*, *supra*, slip op. 5-6. Following established practice under the Reclamation Act, individual water users on the Newlands Project in turn obtained a right to receive Project water by filing an application with the Bureau of Reclamation. That application, upon acceptance by the Bureau, became a water right contract between the government and the landowner. 34 Interior Dec. 544 (1906); 40 Interior Dec. 641, 669 (1912); *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1124-1127 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977), vacated as moot, No. 82-458 (Jan. 10, 1983). See *Nevada* v. *United States*, *supra*, slip op. 11-15 & n.9; *Ickes* v. *Fox*, 300 U.S. 82, 90 (1937). As early as 1906, the regulations required the water right applications to state a specific limit on the quantity of water to be furnished. 34 Interior Dec. at 545; 40 Interior Dec. at 669; 2 S. Wiel, *Water Rights in the Western States* 1292-1294, 1297 (3d ed. 1911). Consistent with this requirement, the contracts in effect between the United States and owners of more than 42,000 of the 73,000 acres of Newlands Project land for which there are Project water rights expressly limit the right to receive Project water to no more than 3.0 acre feet per acre (afa) annually. Pet. App. 87.

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[2] Some water rights on the Carson River have a priority date earlier than 1902 because the United States acquired by contract vested Carson River water rights for 29,884 acres of land having priority dates between 1865 and 1902. Pet. App. 76-77.

On December 18, 1926, the United States entered into a contract with respondent Truckee-Carson Irrigation District ("TCID"), under which TCID assumed responsibility for the operation of the Newlands Project works (Article 6; see *Nevada* v. *United States*, *supra*, slip op. 6 & n.4) and the period for repayment of construction costs by Project water users was extended (Article 8). Article 7 of the 1926 Contract requires TCID to operate the Project in full compliance with the reclamation laws, the individual contracts between Project water users and the United States, "the rules and regulations of the Secretary [then] in force or [t]hereafter promulgated," and court orders and decrees. Article 7 also obligates TCID to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water * * *." Under Article 12 of the 1926 Contract, individual landowners on the Project who accepted the benefits of the Contract were deemed to have consented to its terms.[3]

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[3] As recited in Article 1, the Contract between the United States and TCID was entered into pursuant to, *inter alia*, the Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 23 of that Act (44 Stat. 641-642) excused water users on the Newlands Project from payment of certain of its costs, and Section 45 (44 Stat. 648-649) provided for the extension of the period for repayment of construction costs for reclamation projects generally if an irrigation district assumed liability for those charges. The 1926 Act was passed in response to the report of a committee, known as the Fact Finders, appointed to investigate the reclamation program. See S. Doc. No. 92, 68th Cong., 1st Sess. (1924). One problem addressed by the Fact Finders was the wasteful use of water on reclamation projects. *Id.* at 76-79. The Fact Finders recommended that, "if necessary, compulsory steps should be taken to prevent the excessive use of water in irrigation, as a means of making the water user protect himself against his own waste-

2. The United States commenced this quiet-title action in 1925 in the United States District Court for the District of Nevada seeking a determination of all rights to the use of the waters of the Carson River system. The United States sought confirmation of its appropriative right, with a 1902 priority date, to divert Carson waters at the rate of 5,000 cubic feet per second for irrigation and allied uses on the Newland Project. Evidence concerning this claim was taken by a special master intermittently between 1929 and 1940. In 1949 and 1950, the district court issued temporary decrees setting an annual duty of water for irrigation uses on the Project's Carson Division of not more than 2.92 afa as measured at the farm headgates (Pet. 9-10; Pet. App. 114-115; Nev. Br. in Opp. 2; TCID Br. in Opp. 4). Thereafter, until entry of the final decree in 1980, the rights of the parties were governed by the 1950 temporary decree.

3. In 1967, the Secretary of the Interior invoked his authority under Section 10 of the Reclamation Act of 1902, 43 U.S.C. 373, as preserved in Articles 7 and 34 of the 1926 Contract with TCID, to adopt regulations for the operation of the Newlands Project. 32 Fed. Reg. 3098 (1967). Those regulations, which remain in effect, affirm the trust obligation of the United States to protect the Tribe's rights in the waters of the Truckee River and Pyramid Lake. 43 C.F.R. 418.1(b). The regulations direct that criteria be established for the coordinated operation and control of the Truckee and Carson Rivers to ensure compliance with the decrees in *Orr Ditch* and the instant

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ful practices." *Id.* at 78. The provision in the TCID contract to ensure the economical and beneficial use of irrigation water implemented this recommendation.

case, respectively, and to maximize the use of Carson River water to meet the requirements of the Newlands Project and thereby to conserve Truckee River water to flow into Pyramid Lake. 43 C.F.R. 418.3(a).

4. This case remained relatively dormant until 1968, when the Tribe moved to intervene. The Tribe asserted that the regulations issued by the Secretary in 1967 had "unitized" the Carson and Truckee Rivers (Pet. App. 115) and that, because Truckee River waters are "used in conjunction with the Carson River in irrigating the federal Newlands Reclamation Project" (*id.* at 109), the final decree in this case could impair the Tribe's rights to Truckee River water for its fishery in Pyramid Lake (*id.* at 115-116). On January 3, 1969, the district court denied the Tribe's motion to intervene (Pet. App. 107-112) on the grounds that the Tribe's application was untimely under Fed. R. Civ. P. 24(a), that the Tribe had no interest in the waters of the Carson River or in the outcome of the instant case, and that, in any event, the Tribe's interests were adequately represented by the United States. The court of appeals affirmed on like grounds (Pet. App. 113-122; *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763 (9th Cir. 1970)), and this Court denied certiorari, 401 U.S. 909 (1971).

5. The Tribe, meanwhile, had sued the Secretary and the Attorney General in the United States District Court for the District of Columbia seeking protection of its Truckee River rights. The Secretary, pursuant to the general regulations promulgated in 1967, adopted specific operating criteria for the Newlands Project for 1973. The Tribe then contended in the suit in the District of Columbia that the proposed criteria furnished more water to the Newlands Proj-

ect than was provided for in the *Orr Ditch* decree and the 1950 decree then in effect in the instant case, permitted wasteful practices, and failed to fulfill the Secretary's trust obligation to maximize flows into Pyramid Lake. The district court agreed and ordered the Secretary to amend the operating criteria to maximize flows into Pyramid Lake. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 262-266 (D.D.C. 1972); Pet. App. 21-50. In so holding, the court observed that provisions for enforcement of the criteria adopted by the court would be necessary because TCID, which had control of the Project works under the 1926 Contract, had formally announced that it would "disregard" even the less stringent criteria adopted by the Secretary and would "divert water as it chooses by giving instructions to its own water masters" (354 F. Supp. at 258; Pet. App. 35).

The Secretary acquiesced in the district court's decision in *Pyramid Lake Paiute Tribe* v. *Morton* and published the new operating criteria ordered by the district court. 38 Fed. Reg. 6697 (1973). After TCID announced that it would not adhere to these new criteria, the Secretary, pursuant to authority reserved in Article 32 of the 1926 Contract with TCID, notified TCID on September 14, 1973 of his intent to cancel that Contract and thereby to terminate TCID's authority to operate the Project. Before the termination could take effect, TCID sued the Secretary in the United States District Court for the District of Nevada to prevent the termination. That suit was tried in 1979, but has not yet been decided. *Truckee-Carson Irrigation District* v. *Secretary of the Interior*, Civil No. R-74-34-BRT (D. Nev.).

6. In the 1970's, the parties to the instant case exhibited a renewed interest in the entry of a final de-

cree establishing rights to the use of Carson River water. After evidence regarding the appropriate water duty for Newlands Project lands was presented to the district court in 1979, the district court entered its final decree on December 18, 1980. The district court determined that on the Newlands Project, the annual water duty delivered to the land (*i.e.*, exclusive of loss in storage and transportation) should be 3.5 afa for bottom lands and 4.5 afa for bench lands (Pet. App. 92). The district court further ruled that holders of decreed water rights, including those on the Newlands Project, who desire to change the place of water diversion or place or manner of water use must apply to the Nevada State Engineer, with the State Engineer's determination subject to review by the district court (Pet. App. 104-106). The court noted that under Nevada law, such an application must be denied if the proposed change conflicts with existing rights, even those with a junior priority, or "threatens to prove detrimental to the public interest" (*id.* at 104-105, quoting Nev. Rev. Stat. § 533.370(3) (1981)).

7. The court of appeals affirmed the judgment of the district court on the issues relevant here.

a. The court of appeals rejected the contention advanced by the United States and the Tribe that water deliveries to 42,447 acres on the Newlands Project must be limited to 3.0 afa, as provided by the express terms of the water-rights contracts for those lands that were entered into before 1926 (Pet. App. 87-88).[4] The court stressed that it was not holding that

[4] The court also rejected the government's claim that water rights for the entire Project were limited to 3.0 afa because a 1903 Nevada statute, since repealed, limited irrigation uses of appropriated water to that amount. The court of appeals, agreeing with the district court (Pet. App. 85-87),

the contracts were ultra vires when made. Instead, the court expressed the view that beneficial use is a "dynamic concept" whose measure may change over time and that the appropriate question therefore was whether the district court reached a correct determination of beneficial use as of 1980 (Pet. App. 8). On this premise, the court sustained the district court's finding that water duties of 3.5 and 4.5 afa were appropriate notwithstanding the contract limitations (*id.* at 10-13).

b. The court of appeals also sustained, as applied to Newlands Project lands, the district court's holding that applications for changes in the place of diversion or place or manner of use of water must be filed with the State Engineer (Pet. App. 13-15). The court stressed that the State Engineer would be bound to follow applicable federal law, such as the requirement that water appropriated for irrigation purposes be used only for those purposes and on the land to which the water right is appurtenant (*id.* at 14). In addition, the court reasoned that federal interests would be safeguarded as a procedural matter by the assurance that the United States will receive notice of such applications and by the provision in the decree for review of the State Engineer's rulings by the district court (*id.* at 15).[5]

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held that this 1903 state statute did not govern or restrict Project water rights because those rights had vested when the United States appropriated water for the Project in 1902, before the statute was enacted (Pet. App. 8, 9-10). The Tribe does not challenge that holding here.

[5] The court of appeals vacated (Pet. App. 17-19) that portion of the district court's decree setting aside a 30,000 acre-foot pool at Lahontan Reservoir for fishing and recreation. Both the government and TCID had protested this award because "no party presented evidence to establish a specific, pub-

c. The United States obtained an extension of time, to and including February 14, 1983, within which to file a petition for rehearing in the court of appeals, but subsequently elected not to file a rehearing petition. However, within the extended period, the Tribe filed a motion for intervention or, in the alternative, for substitution of the Tribe for the United States as the appellant. The Tribe tendered with its motion to intervene a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied the Tribe's motion to intervene or for substitution of parties on April 1, 1983 (Pet. App. 20), and thus did not rule on the Tribe's petition for rehearing.

ARGUMENT

The United States does not oppose the Tribe's petition to intervene. However, we suggest that the petition for a writ of certiorari should be denied.

1. We do not oppose the Tribe's motion to intervene in this Court, now that the United States has elected not to seek review of the court of appeals' decision. When the Tribe's motion to intervene was denied by the district court in 1969, the denial was based in large measure on the conclusion that the Tribe had no interest in the proceedings because it had no legal right to waters of the Carson River (Pet. App. 111-112, 119-122). Respondents State of Ne-

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lic recreational right" (Pet. App. 17). The court of appeals remanded with instructions that the district court determine whether such a recreational pool is legally permissible under federal reclamation law and is necessary as a matter of fact in this case, noting that any recreational water duty "must be subordinate to the agricultural needs of the Newlands Project farmers" (Pet. App. 19). The Tribe does not challenge this aspect of the ruling below.

vada and TCID make the same argument here (Nev. Br. in Opp. 5-7; TCID Br. in Opp. 7-9). Although the United States opposed the Tribe's motion to intervene in part on this ground in 1969 (Pet. App. 109-110; U.S. Br. in Opp., *Pyramid Lake Paiute Tribe* v. *United States* (No. 927, 1970 Term)), we now believe that this view ignores the obvious interrelationship between the Truckee and Carson Rivers.

Pyramid Lake is the terminus of the Truckee River, and any water diverted from the Truckee therefore results in a gallon-for-gallon reduction in the amount of water furnished to the Lake and its fishery. As this Court recognized in *Nevada* v. *United States*, *supra*, slip op. 4, and as TCID concedes (TCID Br. in Opp. 7), the waters of the Carson River are commingled in Lahontan Reservoir with waters diverted from the Truckee River, and the waters then are distributed from Lahontan Reservoir to Newlands Project lands. Because the waters of the two Rivers are commingled in this fashion, the water right contracts at issue in this case confer a right to receive water from the Project, not from one of the two Rivers. Therefore, although this case actually adjudicates rights only to Carson River waters, the court of appeals' holding that Project landowners whose water right contracts specify a maximum water right of 3.0 afa are not bound by that limitation presumably will apply to all Project water, including that diverted from the Truckee River. The effect of the judgment below therefore will be a greater diversion of Truckee River water to the Project to satisfy the water duties of 3.5 or 4.5 afa decreed by the district court than would be required to satisfy the maximum of 3.0 afa specified in the contracts.[6]

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[6] TCID contends (TCID Br. in Opp. 8-9, 11) that Project lands already were entitled to receive 3.5 or 4.5 afa of Truckee

The interrelationship of the two River systems also is reflected in the Interior Department regulations governing the operation of the Newlands Project. 43 C.F.R. Part 418. Those regulations recognize the trust responsibility of the United States to protect the interests of the Tribe in Pyramid Lake and require that diversions from the Truckee be held within decreed rights in order to make additional water available for the Lake. In addition, those regulations require that maximum use be made of the flows of the Carson River to satisfy the demands of the Newlands Project, thereby making as much Truckee River water as possible available for Pyramid Lake. 43 C.F.R. 418.3(a).[7]

River water under the *Orr Ditch* decree and that the decree in this case concerning rights to Carson River water therefore does not incrementally harm the Tribe. This contention is mistaken. *Orr Ditch* confirmed a right in the United States to divert water for the Newlands Project, and set a *maximum limit* on this right by providing that the amount of water allowed for irrigation "shall not exceed" 3.5 afa for bottom lands or 4.5 afa for bench lands. App. to Pet. for Cert. 59a, *Nevada* v. *United States* (No. 81-2245, 1981 Term). The *Orr Ditch* decree did not establish these maximum figures as an *entitlement* for individual parcels of land. See App. to Pet. for Cert. 146a. As the Court explained in *Nevada* v. *United States*, *supra*, slip op. 11-15 & n.9, individual Project water users obtained a right to Project water when they entered into contracts for such a right, and the terms of those contracts therefore define the individual water rights.

[7] The Tribe's interest in the Carson River adjudication is not diminished by the Court's decision in *Nevada* v. *United States*, *supra*, that the doctrine of res judicata bars judicial recognition of a prior reserved right to waters of the Truckee River for the benefit of the Tribe as against the previously decreed rights of Newlands Project landowners and subsequent appropriators of Truckee River waters. The fact remains that any Truckee River waters remaining after satisfy-

For the foregoing reasons, we believe the Tribe has a sufficient interest in the case to satisfy the requirements for intervention as of right under Fed. R. Civ. P. 24(a) or permissive intervention under Fed. R. Civ. P. 24(b). Under Rule 24(a), it is enough that the applicant "claims an interest relating to the property or transaction which is the subject of the action" and that he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. Here, the Tribe's interest in Truckee River water is "related to" the determination of rights in the Carson River, with which Truckee River waters are commingled for delivery under contracts applicable to both Rivers. And the Tribe's ability to protect its interest in minimizing diversions from the Truckee River by ensuring that Project water deliveries conform to the terms of individual water right contracts will be impaired if the judgment below stands. The reason is that the Tribe will be bound by the holding on the contract limitation issue in this case by virtue of the United States' appearance as a party. *Nevada* v. *United States*, *supra*. Similarly, the Tribe meets the standard for permissive intervention under Fed. R. Civ. P. 24(b), which requires only that the "applicant's claim or defense and the main action have a question of law or fact in common."

Denial of intervention in 1969 also rested in part on the ground that the United States would adequately represent the interests of the Tribe. The gov-

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ing those rights will flow into Pyramid Lake. The size of this residuum available for Pyramid Lake necessarily will be reduced if the amount of water required to be made available to Project water users is increased beyond the amount specified in their contracts.

ernment in fact did so in the district court and court of appeals. But because the United States has elected not to petition for certiorari, it cannot be said that the Tribe's interests are represented by the United States before this Court. To be sure, Fed. R. Civ. P. 24(a) and (b) require that a motion to intervene be "timely," and intervention was denied in part on this ground in 1969, since the Tribe's motion at that time was filed more than 40 years after the suit was brought. But we believe it would be appropriate to regard the timeliness of intervention as affected by the question of the adequacy of representation. Here the Tribe moved immediately to intervene, before the judgment became final, when it appeared that the United States would not seek further review. Compare *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 5, 8-9; *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980). The other parties to the case are not significantly prejudiced by the timing of the Tribe's petition to intervene, because the Tribe actively participated amicus curiae below and does not raise any new issues here, but rather presses arguments advanced by the United States in the court of appeals on which the government itself could have sought certiorari.

2. The Tribe argues (Pet. 17-26) that the court of appeals erred in excusing the owners of some 42,000 acres of Project land from the provisions of the water right contracts they or their predecessors in interest voluntarily entered into with the United States that limit water deliveries to 3.0 afa annually. Although we agree that the court of appeals' decision is erroneous, we do not believe that decision warrants review by this Court.

a. As we have explained above (see page 3, *supra*), from the beginning the Department of the

Interior implemented the Reclamation Act through a system of contracts with individual water users that specified limitations on the amount of water to be furnished. Article 7 of the 1926 Contract between TCID and the United States requires TCID to deliver water in accordance with the terms of such contracts. See page 4, *supra*.[8] The comprehensive report of the Fact Finders in 1924 likewise took the view that water rights on reclamation projects "should never be established except upon the basis of a definite quantity of water." S. Doc. No. 92, 68th Cong., 1st Sess. 78 (1924). And it was already well established under state law at the beginning of this century that an appropriation of water was limited to the amount set forth in the original claim (1 S. Wiel, *supra*, at 496) and that limitations in contracts between a water user and a water company were binding upon the water user. 3 C. Kinney, *A Treatise on the Law of Irrigation* 272 (2d ed. 1912).

Against this background, it is not surprising that the court of appeals explicitly did not hold that the contract provisions at issue here were ultra vires when they were agreed to by the parties (Pet. App. 8). Nor could the court of appeals find the 3.0 afa limitation arbitrary or capricious, in light of the contemporaneous 1903 Nevada statute providing for a maximum of 3.0 afa for irrigation (see note 4, *supra*), the average water deliveries of less than 3.0 afa after the Project was opened (S. Doc. No. 92, *supra*, at 216), and the temporary decree in effect

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[8] In view of this express incorporation of the provisions of the individual contracts into the 1926 Contract with TCID, TCID plainly errs in contending (TCID Br. in Opp. 14) that the limitations in the individual water right contracts were modified by the 1926 Contract.

in this case from 1950 to 1980 which set a ceiling of 2.92 afa. The court of appeals held, however, that beneficial use is a "dynamic concept" that may expand over time and that the district court therefore properly evaluated the issue as of the year 1980 (Pet. App. 8). But even if the district court were correct that Project lands might benefit from more water at the present time, the appropriate procedure would be for the landowners to seek to renegotiate their contracts with the Secretary. The district court itself could not properly reform the original contracts, especially on a *retroactive* basis that fixes a 1902 priority date for the additional water at the expense of the intervening demand for water for Pyramid Lake.[9]

b. Notwithstanding our view that the court of appeals erred on the contract issue, we have not petitioned for a writ of certiorari to review the judgment of the court of appeals and we do not urge the Court to grant the Tribe's petition raising the same issue. We have been informed by the Department of the Interior that it does not believe that the question of the binding effect of contract limitations is one of general importance on reclamation projects in the States comprising the Ninth Circuit. We note in this regard that the decision by the District of Columbia Circuit on remand from this Court's decision in *Ickes* v. *Fox*, 300 U.S. 82 (1937) — see *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943) — is

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[9] Nor does a supposed lack of uniformity excuse compliance. The contracts covering the Project lands that do not contain a specific limitation of 3.0 afa likewise do not contain a *higher* figure that could be regarded as inconsistent; they simply do not specify any particular maximum figure. The early practice on the Project suggests that the Secretary in fact regarded the 3.0 figure to be the appropriate amount for beneficial use on *all* Project lands.

consistent with the decision below. Yet despite that old precedent, the issue of the validity of contract limitations does not appear to have recurred in the reclamation program. Moreover, this case might be thought to arise in somewhat unique circumstances insofar as the court below rested its decision in part on a supposed lack of uniformity among and enforcement of the contract provisions. If the decision in this case creates broader difficulties in the administration of the reclamation program in the future, review could be sought at that time.

To be sure, the decision does have a concrete impact on the Tribe, which estimates (Pet. 12-13 & n.5) that it will lose a minimum of 38,000 afa of water annually as a result. Yet the fact remains that the present case is confined to the particular circumstances of the Pyramid Lake Reservation and the Newlands Project. This Court, in *Nevada* v. *United States, supra,* already has given plenary review to another aspect of the overall controversy regarding the allocation of water between these two entities. We do not urge it to grant plenary review in another aspect of that controversy. Indeed, we had urged the Court to deny the certiorari petitions in *Nevada* v. *United States* in part because of the unique circumstances of the case (U.S. Br. in Opp. 21-24 (Nos. 81-2245 and 81-2276, 1982 Term)), and there does not appear to be a basis for suggesting a different disposition here.

We are mindful of the continuing obligation of the United States to protect the Lake and its fishery for the Tribe. But we are mindful as well of the other responsibilities with which Congress has charged the Executive in this area (see *Nevada* v. *United States, supra,* slip op. 16-17, 29-31) and of the public interest in bringing to a close this phase of the north-

western Nevada water rights litigation, which is now 58 years old. We trust that within the limits of the decrees in this case and *Orr Ditch*, the maximum protection possible may be afforded Pyramid Lake and its fishery.

3. We also do not believe review is warranted of that portion of the judgment below which provides for applications for changes in the place of diversion or manner or place of use—even as regards Project water rights—to be submitted to the State Engineer. The potential impact of this requirement is uncertain at this time, and the provision for interested parties to seek review of the State Engineer's determination in the district court will afford some protection for federal interests, perhaps including those of the Tribe in minimizing diversions of Truckee River waters. Cf. Pet. App. 107. Moreover, the court of appeals made clear that the State Engineer would be bound to follow federal law where applicable (*id.* at 15), which presumably would include appropriate regulations for the operation of the Newlands Project that might be issued by the Secretary, should the need arise, pursuant to the authority expressly conferred by Section 10 of the Reclamation Act, 43 U.S.C. 373, and preserved in Articles 7 and 34 of the 1926 Contract between TCID and the United States.

CONCLUSION

The petition for intervention should be granted and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-1723

In The
Supreme Court of the United States
October Term, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,
Respondents.

REPLY BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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I. Introduction

This case presents significant questions over the meaning of Sections 8 and 10 of the Reclamation Act of 1902, 32 Stat. 388, 43 U. S. C. §§ 372, 373, 383, and the role which the Secretary of the Interior is to play in the management of Reclamation projects. It also is of monumental importance to the Pyramid Lake Paiute Tribe and the endangered Cui-ui and threatened Lahontan Cutthroat trout which inhabit Pyramid Lake.

In the present case, the Tribe asks that the Newlands Project water users be compelled to abide by the terms of their water right contracts with the federal government. No allegation exists that those contracts were entered into under duress or were not thought to represent reasonable and appropriate limits to the use of water at the time of execution. Instead, the water users claim to be entitled to a *de novo* determination of their water duties, no matter what the terms of their contracts. As described below, no valid basis exists to set aside the contract terms.

The Tribe also asserts that Section 17 of the Act of August 4, 1938, 53 Stat. 1197, 43 U. S. C. § 389 is a specific directive of Congress which governs the role of the Secretary over change applications on the Project. Remarkably, the Court of Appeals and the respondents fail to discuss this statutory provision.

II. The Pyramid Lake Tribe Is Entitled To Intervene In This Case Because The Amount Of Water Available From The Truckee River For the Pyramid Lake Fishery Will Be Detrimentally Affected By The Newlands Project Water Duties.

Because the United States has decided not to petition for review of the Ninth Circuit decision, the Tribe seeks to intervene before this Court. The tribal interest is substantial. As noted by the Truckee-Carson Irrigation Dis-

trict ("TCID"), 50% of the water supply for the Newlands Project is contributed by the Truckee River. Truckee-Carson Irrigation District's Brief in Opposition ("TCID Br.") at 6. That fact is the basis for the Tribe's undeniable interest in the present litigation. As noted in the Tribe's Petition For Leave To Intervene and Petition for Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit Court of Appeals ("Tribe's Pet.") at pp. 7-9, 12-14, the Tribe's concern is the retention of the operating criteria and procedures promulgated by the Secretary of the Interior following the decision in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D. C. 1973).[1] If followed, those regulations would indisputably result in additional flows of water to Pyramid Lake.

The impact of the lower courts' decisions on those regulations was previously admitted by TCID. *See* Tribe's Pet., Appendix D at 57-59. In its brief, however, TCID argues that the continued imposition of the 3.0 AFA contract duty would result in less, rather than more, water being available for Pyramid Lake. As the basis for this mistaken assertion, TCID relies on the language of the decree in *United States v. Orr Water Ditch Company*, Equity No. A-3 (D. Nev. 1955) which according to TCID, establishes Newlands Project water duties of 3.5 and 4.5 acre feet per acre per year ("AFA") from the Truckee River.

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[1]The Tribe could not have moved to intervene after the Pyramid Lake Tribe v. Morton decision since the United States was then "vigorously" advancing the same contentions as the Tribe wished to assert. *See* App. 12. Until the United States decided not to seek review of the Ninth Circuit's decision, the Tribe had no grounds to assert that its concerns were not represented in the litigation.

That contention overlooks two critical points. First, the *Orr Ditch* decree provides only that the water duties for the Newlands Project "shall not exceed" 3.5 and 4.5 AFA. It does not provide an absolute right to those amounts of water. 1979 Exhibit 53, pp. 10-11. *See* Brief for the United States at n. 6. Second, the decree in this case specifically provides that "The water duties assigned for the various categories of the land are the total duties from whatever source of surface water." Final decree at 3. Similar provisions were included in the temporary decree (Exhibit A, p. 4) and in the proposed decree of the Special Master. The *Orr Ditch* decree also contains language to that effect. The inclusion of such terminology makes the more restrictive limit controlling, whether that limit is contained in the decree for the Truckee or the Carson River. At any rate, assuming that the decree in this case provided for a 3 AFA duty, the only way to adhere to the language of both decrees would be to apply a 3 AFA duty to all lands served by the Carson River. That would be consistent with the *Orr Ditch* language of "not to exceed" 3.5 AFA and 4.5 AFA as well as the establishment of a duty of 3.0 AFA from all sources in this case. The result would be additional water for Pyramid Lake.

Nevada also opposes tribal intervention, claiming that the Tribe should accept the decision of the Solicitor General not to seek a writ of certiorari in this case. The simple answer to that argument is that the United States does not oppose tribal intervention. The Solicitor General acknowledges, as he must, that the United States no longer represents the Tribe's interests in this matter.

In sum, the Tribe is the only entity with a continuing interest in seeing that the Newlands Project water users adhere to the terms of their contracts. Accordingly, intervention by the Tribe is warranted.

III. The Terms Of The Water Users' Contracts Establish Valid Limits On Their Water Duties.

TCID and Nevada argue that the 3 AFA water duty contained in the water users' contracts for 42,447 acres of the Newlands Project should be ignored. The 3 AFA contractual limit, in the view of Nevada and TCID, conflicts with the Reclamation Act's directive that "beneficial use shall be the basis, the measure, and the limit of the right." *See* Sec. 8 of the Reclamation Act of 1902, 32 Stat. 388, 390, 43 U. S. C. § 372. The Tribe contends that the Secretary had ample authority to execute the questioned contracts and that the terms of the contracts are controlling. Merely because a court now reaches a different conclusion than that initially reached by the Secretary and the water users does not warrant reformation of the contract terms.[2]

The Tribe's Petition discusses the long standing position of the Department of the Interior that the establishment of specific water duties was necessary and authorized by the 1902 Act.[3] Congress also appears to have construed

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[2]By analogy, condemned landowners are, under the Fifth Amendment, entitled to just compensation from the condemnor. Yet the Fifth Amendment does not prevent a landowner from contracting to accept a sum which might prove less than just compensation, and such contractual limits are enforced. Albrecht v. United States, 329 U. S. 599, 603 (1947); Honolulu Rapid Transit Co. v. Dolim, 459 F. 2d 551, 553 (9th Cir. 1972), *cert. denied*, 409 U. S. 875; United States v. 114.64 Acres in Custer County, Idaho, 504 F. 2d 1098, 1100 (9th Cir. 1974). So also, a water rights owner should be contractually bound by agreed limits on beneficial use to which he consents.

[3]The authority of the Secretary to enter into contracts has been frequently used to resolve factual questions related to Reclamation projects. For example Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d expressly empowers the Secretary to allocate project water by contract. Arizona v. California, 373 U. S. 546, 588-86 (1963). The authority of the Secretary to enter into contracts which limit the rights of irrigators predating a reclamation project has been upheld. United States

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the Act in a similar fashion. *See* Tr. Pet. at 18-19. These interpretations are entitled to great weight. *See Bryant v. Yellen*, 447 U. S. 352, 377-378 (1980); *California v. United States*, 438 U. S. 645, n. 30 (1978); *Swigart v. Baker*, 229 U. S. 187, 196-198 (1912). That view is also supported by reference to contemporaneous water law. Under state law, an appropriation of water was limited to the amount of the original claim. 1 S. Wiel, *Water Rights in the Western States*, 496 (3d ed. 1911). Indeed, at the two most critical points in the history of the Newlands Project, in 1903 when the water rights were first claimed and in 1907 when the Secretary announced the availability of appropriated water for use on the Project,[4] Nevada law limited water duties in the State to the specific quantity of 3 AFA. *See* Sec. 2 of the 1903 Nevada Cooperative Act, 1903 Nev. Stat. 18, 25; Sec. 5 of the Act of February 26, 1907, ch. XCVI, 1907-1908 Nev. Stat. 31. And, at the time the Project was established, limitations in contracts between a water user and a private water company were considered binding on the water user. 3 C. Kinney, *A Treatise on the Law of Irrigation*, 272 (2d ed. 1912).

Neither TCID nor Nevada dispute the history of the inclusion of such limits in Reclamation contracts. Instead, they claim that Section 8 of the 1902 Act precludes the Secretary of the Interior from imposing any limit on the

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v. Westside Irrigation District, 230 F. 284 (E.D. Wash. 1916), *aff'd*, 246 F. 212 (9th Cir. 1917). Similarly, the courts have viewed the service contracts executed by the Secretary as determinative of the project boundaries. *See generally* 2 Clark, *Water and Water Rights* 182, n. 12 (1972).

[4]In Yuma Water Assn. v. Schlecht, 262 U. S. 138, 144, 146 (1923) it was held that such notice, pursuant to Section 4 of the 1902 Reclamation Act, 43 U.S.C. § 419, was the critical time for fixing the identity of project lands, the terms and conditions for entry upon them, and the charges payable to the government for project water delivery.

water users which results in a water supply less than beneficial use as determined in a *de novo* judicial proceeding. The practical impact of that assertion is to render the terms of any contract meaningless when those terms relate to the water duty on a Reclamation project. It also reads far too much into Section 8 and ignores Section 10.[5] Section B does not say that only a court may finally determine beneficial use or that the Secretary and the project water users may not enter into binding contracts to resolve such questions.[6]

When all is said and done, TCID's and Nevada's argument is that, in their view, the district court did a better job of ascertaining the water duty than did the Secretary and the water users at the time they entered into the contracts. Whatever the merits of that evaluation, it is not a valid basis to reform the terms of otherwise binding contracts.

IV. This Case Merits Review By This Court.

The United States does not argue that the decision below is correct. To the contrary, the Government cand-

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[5]TCID mistakenly assumes that acceptance of the Tribe's position would require a new trial under different standards. To the contrary, under the position espoused by the Tribe, the contract terms would control and no trial would be required. We certainly do not accept TCID's unsubstantiated assertion that the initial inclusion of the 3 AFA limited was not based on a proper administrative determination. *See, e. g.*, U. S. Exh. 9. Indeed, TCID participated in the earlier phases of the trial leading up to the temporary decree and had no objections to the entry of that decree containing a 2.92 AFA limit. *See* Preliminary Determination and Adjudication and Temporary Restraining Order dated March 24, 1950. *See also* Brief for the United States at pp. 15-16.

[6]TCID, Nevada, the district court, and the court of appeals all have viewed Fox v. Ickes, 137 F. 2d 30 (1943), *cert. denied*, 320 U. S. 792 (1943) as dispositive. We do not agree and neither does the United States. *See* Brief for the United States at pp. 14-16. In any event that decision is not binding on this Court.

idly points out the substantial errors in the lower courts' decisions. Nevertheless, the Solicitor General argues that, for one reason or another, the issues in the case do not merit review by this Court, despite their acknowledged importance to Pyramid Lake.

In response, we first briefly note our view of the impact of the resolution of these issues on the Pyramid Lake Tribe. For the Tribe, the practical effect of the Ninth Circuit's decision is the evisceration of the well-established Congressional policies favoring the preservation of endangered species and the encouragement of Indian self sufficiency and economic development. *See* Tribe's Pet. at 5-6, 14, 25-26. Second, this case raises timely questions over the importance of water conservation and the role of the Secretary vis-a-vis the courts in the management of federal reclamation projects. As noted at pp. 4-5, *supra,* long standing regulations of the Department of the Interior have required the inclusion of specific water duties in the contracts of Reclamation water users and no reason exists to believe that such provisions are not widespread. Although Interior and project water users may have failed to abide by those limits in the past, in the future, the ever increasing need to conserve water will surely focus far more attention on the critical importance of enforcing the agreed upon water duties.[7] Third, the question

[7]The contract terms here are reflective of Nevada law which requires water rights to be limited to the amounts "reasonably and economically used for irrigation." NRS 533.060. *See* Roeder v. Stein, 23 Nev. 92, 96-97, 42 P. 867 (1895); Dick v. Caldwell, 14 Nev. 167, 169-170 (1879). A requirement of economic use imposes a more restrictive limit than mere beneficial use. *See* Fox v. Ickes, *supra,* 137 F. 2d at 35 n. 8. The decisions below do not address the extent to which the infusion of additional capital into the Project would result in the savings of water while maintaining historical production levels. Senator

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of the finality of contracts executed by project water users is presented immediately following a term in which this Court told the Pyramid Lake Tribe, as well as Tribes in Arizona and California that judicial decisions involving their water rights were final, whatever injustice might result. *See Nevada v. United States,* No. 81-2254 (June 24, 1983); *Arizona v. California,* 75 L. Ed. 2d 318 (1983). Similar deference is due to contractual limits on non-Indian water rights. Finally, having acknowledged that as a matter of law, the Ninth Circuit's decision was in error, the policy decision by the Departments of the Interior and Justice not to seek certiorari is suspect, at the least, in light of the political pressure on those Departments. *See* Letter to the Honorable William French Smith from Paul Laxalt dated October 7, 1981. (A copy of that letter is Appendix 1 to this Brief); *see also* Tribe's Pet. at 17, App. 68.

The Government's suggestion that the Tribe ought to abide by the lower courts' decision, even if wrong, is particularly ironic in light of the decision of this Court in *Nevada v. United States, supra,* that the prior failure of the Government to assert the tribal fishery water right barred the independent assertion of that right by the Tribe against the parties to the earlier decree. The Tribe suffered a major loss in *Nevada v. United States, supra.* All it seeks here is to compel the Newlands Project water users to abide by the terms of their contracts, just as the Tribe has been compelled to abide by the terms of the *Orr Ditch* decree.

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Laxalt, however, has proposed that 46,000 acrefeet of water could be saved through a rehabilitation and betterment program proposed by the Bureau of Reclamation. 128 Cong. Rec. S. 4826 (May 11, 1982; daily ed.)

V. Congress Has Specifically Granted The Secretary Of The Interior Authority To Regulate Changes In The Use Of Water On Reclamation Projects.

As noted in the Tribe's petition at p. 18, § 14 of the Act of August 4, 1939, 53 Stat. 1197, 43 U. S. C. § 389, authorizes the Secretary "to enter into such contracts for exchange or replacement of water, water rights . . . or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project." Having been directed by Congress to exercise his judgment over such matters, the Secretary is not required to defer to the State Engineer. Quite plainly, it is the Secretary to whom Congress has delegated the task of weighing the federal interests affected by any change in use.[8] The fact that under the existing decree the Secretary may seek review in the local district court if the State Engineer does not accept the Secretary's judgment does not satisfy the legislative mandate that the Secretary exercise control over these matters.

Dated August 22, 1983.

Respectfully submitted,

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[8]TCID is mistaken in asserting that no additional consumptive use could occur as a result of changes in use on the Project. A change in place of use could easily result in additional conveyance losses even if the on-farm consumptive use remained the same.

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APPENDIX

UNITED STATES SENATE
Washington, D. C. 20510
October 7, 1981

Dear Bill:

RE: ALPINE APPEAL

While it's fresh on my mind . . .

—This has immense political overtones out there. All those ranchers—who are ours—feel they're finally going to get some relief from this Administration. To have to go through the legal expense and hassle of an appeal will be a real "downer" for them.

—On the merits this case should not be appealed. Bruce Thompson wrote a helluva sound decision which *will not* be overturned. These poor ranchers should not be compelled to cough up additional legal fees. They've contributed substantially enough already.

—If Rex's shop thinks the Indians can intervene, let them. Even have Justice assist in fulfillment of whatever fiduciary responsibility exists, if any. Then at least the monkey won't be on our political backs.

—Lastly, this would be a badly needed signal—that in a proper case the Attorney General will overrule the careerists in Justice who have never been with us and will never be.

Thanks for listening, old friend.

Sincerely,
/s/ Paul
Paul Laxalt
U. S. Senator

Honorable William French Smith
Office of the Attorney General
Department of Justice
Washington, D. C. 20530
PL/ed